# United States Court of Appeals for the Second Circuit



**APPENDIX** 

75-7083

IN THE

# United States Court of Appeals

FOR THE SECOND CIRCUIT

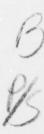
Docket No. 75-7083

JAMES W. HERENDEEN,

Plaintiff-Appellant,

- against -

CHAMPION INTERNATIONAL CORPORATION;
NATIONWIDE PAPERS INCORPORATED; and
CHEMICAL BANK OF NEW YORK TRUST COMPANY;
THE FIFTH THIRD BANK, and the
COMMITTEE, as Administrator of the
Retirement Plan for Salaried Employees
of Certain Subsidiaries of CHAMPION
INTERNATIONAL CORPORATION,



Defendants-Appellees.

#### JOINT APPENDIX

On Appeal from the United States District Court for the Southern District of New York



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UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

JAMES W. HERENDEEN,

NOTICE OF MOTION TO Plaintiff, : DISMISS OR, IN THE ALTERNATIVE, FOR A : MORE DEFINITE STATEMENT

- against -

CHAMPION INTERNATIONAL CORPORATION; NATIONWIDE FAFERS INCORPORATED; and CHEMICAL EANK NEW YORK TRUST COMPANY; THE FIFTH THIRD BANK, and the COMMITTEE, as Administrator of the Retirement Plan for Salaried Employees of Certain Subsidiaries of CHAMPION INTERNATIONAL CORPORATION,

74 Civ. 828 (Judge MacMahon)

Defendants.

PLEASE TAKE NOTICE that upon the annexed affidavit of Jerry L. Brammer, sworn to May 23, 1974, and the exhibits annexed thereto, Champion International Corporation, Nationwide Papers Incorporated (which ceased to exist on or about January 1, 1970), Chemical Bank New York Trust Company, Fifth Third Bank and The Committee, Refirement Income Plan for Salaried Employees of Certain Subsidiaries of Champion International Corporation, will move this Court at Room of the United States Court House, 40 Centre Street, New York, New York, on July 12, 1974, at 2:15 P.M. for an order:

A. pursuant to Rules 12(b)(2), (4), (5) and (6) and 17(b) of the Rederal Rules of Civil Procedure, dismissing each of the two Counts in plaintiff's complaint:

- (1) as to Champion International Corporation and Nationwide Papers Incorporated for failure to state a claim upon which relief can be granted on the ground that any claim for relief against said defendants is interdicted by the express terms of the Retirement Income Plan for Salaried Employees of Certain Subsidiaries of Champion International Corporation ("Flan"), under which plaintiff's claim is asserted and whose provisions plaintiff seeks to enforce. The Plan, by its very terms, is not to be "construed as giving any person whomsoever any legal or equitable right against a Company, Subsidiary or Affiliate" participating in the Plan, and under the Plan, "no Company, Subsidiary or Affiliate shall have any liability or responsibility other than to make contributions to the Trust Fund ... " Plaintiff cannot seek to enjoy the Plan's benefits and at the same time to ignore its express terms and conditions. This action must therefore be dismissed for failure to state a claim against Champion and Nationwide upon which relief can be granted;
- and Fifth Third Bank for failure to state a claim upon which relief can be granted on the ground that under the Plan their functions are purely ministerial, i.e. the receipt and disbursement of funds at the direction of the Committee which administers the Plan, and since plaintiff does not claim to be entitled presently to receive any benefits under the Plan, plaintiff cannot and has not specified any act by said defendants which has

caused or could cause him injury; and

- (3) as to the Committee, Retirement Income Plan for Salaried Employees of Certain Subsidiaries of Champion International Corporation ("Committee"):
- (a) for failure to state a claim upon which relief can be granted on the ground that any claim for relief against said defendant is interdicted by the express terms of the Plan under which plaintiff's claim is asserted and whose provisions plaintiff seeks to enforce. The Plan stipulates that "no liability whatever shall attach to or be incurred by ... the Committee or any representatives appointed hereunder, under or by reason of any of the terms or conditions of the Plan." Since plaintiff cannot seek enforcement of his rights under the Plan while ignoring its other terms and conditions, this action must be dismissed for failure to state a claim against the Committee upon which relief can be granted; and
  - (b) for lack of jurisdiction over the person of the Committee and for insufficiency of process and service of process in accordance with Rule 17(b) of the Federal Rules of Civil Procedure on the ground that plaintiff has failed to comply with the requirements of New York law for naming and serving an unincorporated association such as the Committee, which, unor New York law, cannot be sued in its own name; and
  - B. pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, dismissing the second Count of plaintiff's

complaint as to all defendants for failure to state a claim upon which relief can be granted on the ground that, as a matter of law, punitive damages are not available to plaintiff from any of the defendants by reason of the facts set forth in the complaint; or, in the alternative,

- C. pursuant to Rule 12(e) of the Federal Rules of Civil Procedure, granting a more definite statement of the claims asserted against the defendants, on the ground that the complaint is so vague and ambiguous that defendants cannot reasonably be required to frame a responsive pleading in that the complaint interlards vague accusations of discrimination, conspiracy to deprive plaintiff of his business and other unspecified acts and wrongs, levelled without differentiation and without an iota of factual support against the five defendants collectively, with conclusory allegations which are ludicrous and unbelievable on their face; and
- D. granting defendants, and each of them, such other and further relief as the Court may deem just and proper.

Dated: New York, New York May 24, 1974 KRONISH, LIEB, SHAINSWIT, WEINER & HELLMAN

A Member of the Firm
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UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

JAMES W. HERENDEEN,

Plaintiff,

AFFIDAVIT IN SUPPORT : OF MOTION TO DISMISS OR, IN THE ALTERNATIVE,

74 Civ. 828

(Judge MacMahon)

- against -

: FOR A MORE DEFINITE STATEMENT

CHAMPION INTERNATIONAL CORPORATION; NATIONWIDE PAPERS INCORPORATED; and CHEMICAL BANK NEW YORK TRUST COMPANY; THE FIFTH THIRD BANK, and the COMMITTEE, as Administrator of the Retirement Plan for Salaried Employees of Certain Subsidiaries of CHAMPION INTERNATIONAL CORPORATION,

Defendants.

STATE OF NEW YORK 35 .: COUNTY OF NEW YORK

JERRY L. BRAMMER, being duly sworn, deposes and says:

I am Assistant Secretary of Champion International Corporation ("Champion"), one of the defendants in this action. I have personal knowledge of the matters set forth herein. This affidavit is respectfully submitted in support of the motions of all the defendants in this action for an order: (a) pursuant to Rules 12(b)(2), (4), (5) and (6) and 17(b) of the Federal Rules of Civil Procedure, dismissing each of the two counts in plaintiff's complaint as against all defendants for failure to state a claim upon which relief can be granted, for lack of jurisdiction over the person and for insufficiency of process and of service of process; or, in the alternative, (b) pursuant to

Rule 12(e) of the Feder 1 Rules of Civil Procedure, granting a more definite statement of the claims asserted against the defendants; and (c) granting defendants, and each of them, such other and further relief as the Court may deem just and proper.

#### BACKGROUND OF THIS LAWSUIT

Herendeen's litigation against Champion since his voluntary resignation five years ago.

- 2. This action is but the latest foray by plaintiff, James W. Herendeen, into litigation against Champion International Corporation and any of its subsidiaries, officers, employees and associates that Mr. Herendeen can entrap by his conclusory and often unbelievable allegations. This Court is but the latest forum to be plagued by Mr. Herendeen's crusade of annoyance and harassment. Plaintiff is a former employee of Champion. He had been a paper salesman for Nationwide Papers Incorporated ("Nationwide")\* for several years when, in 1969, he voluntarily submitted his resignation.
- 3. Thereafter, imagining himself somehow to be aggrieved by his own voluntary disassociation from Champion, Mr.

<sup>\*</sup> Nationwide ceased to exist on or about January 1, 1970. Its business is presently a division of Champion, which is successor in interest to Nationwide.

Herendeen launched a crusade up and down the courts of New York State seeking redress against not only Champion, but several of its officers and employees, including Champion's Chairman of the Board, claiming that he had been promised an employment contract. In his complaint in the Supreme Court of the State of New York, County of New York (a copy of which is annexed hereto as Exhibit A), Mr. Herendeen was not even able to specify such basic terms of the alleged contract as the salary he was supposed to receive and the duration of his employment under the alleged contract. In the State Court, Mr. Herendeen sought damages of \$275,000 -- \$200,000 of which was characterized as "commissions and earnings in the commercial paper business" and the remaining \$75,000 as "the benefits of pension and health plans of Champion" (Ex. A, para. 22).

4. Champion and the individual defendants moved in the State Court to dismiss the complaint for failure to state a cause of action. That motion was granted by Mr. Justice Jacob Markowitz on November 30, 1972. In his Decision (a copy of which is annexed hereto as Exhibit B), Mr. Justice Markowitz held:

"The complaint does not allege that the parties entered into a binding agreement at any time; nor does it allege that at any time was there a meeting of the minds on the essential terms of such an agreement. To the contrary, plaintiff's basic position is that he was promised (false though the promise may have been) that a written agreement would be entered into in the future ...

"Representations that one will enter into such an agreement, false or not false, are not actionable, whether the cause of action is pleaded in fraud or in contract ..." (citations omitted).

Pursuant to Mr. Justice Markowitz' Decision, judgment was entered dismissing plaintiff's state action on June 12, 1973. On appeal to the Appellate Division, First Department, the order of dismissal was unanimously affirmed on May 17, 1973, without opinion. On July 3, 1973, the New York Court of Appeals denied plaintiff's motion for leave to appeal to that Court.

by a judgment holding that he has no cause of action either in contract or in fraud against Champion, plaintiff has now -- nearly five years after his voluntary resignation from Champion's employ -- crossed the street to this Court seeking redress for the alleged wrongful cancellation of his benefits under the pension plan in which Champion's employees participate. Even this claim, however, is no stranger to litigation. It was also included in the State Court complaint whose dismissal the highest court of New York refused to upset. The \$75,000 in damages which Mr. Herendeen claimed in the State Court as "the benefits of pension and health plans of Champion" (Ex. A, para. 22) have here been ballooned to a total of \$385,000 in compensatory and punitive damages, claimed to be due from the various defendants named in this Court.

The Retirement Income Plan for Salaried Employees of Certain Subsidiaries of Champion International Corporation.

- 6. This action therefore involves a retirement income plan called, in 1969, the "Retirement Income Plan for Salaried Employees of Certain Subsidiaries of U. S. Plywood-Champion Papers Inc." (hereafter referred to as the "Plan" or the "Retirement Income Plan"). The Plan was established in 1965, when it was known as the "Retirement Income Plan for Salaried Employees of Certain Subsidiaries of Champion Papers Inc." (a true copy of the Plan is annexed hereto as Exhibit C, together with copies of all amendments to the Plan).
- 7. The Plan provides for the payment of benefits to eligible retired employees of companies participating in the Plan from funds placed by the companies in trust with trustees. Eligible employees may, they wish, elect to make contributions to the Plan as well, thereby increasing the benefits they may receive upon retirement (Retirement Income Plan §§ 4 and 7; Ex. C, pages 6-8, 9-13). If an employee has made voluntary contributions but is ineligible to receive benefits upon retirement, the amount of his contributions is returned to him with interest (Retirement lncome Plan § 15.8; Ex. C, page 22).
- 8. The Plan is administered by defendant, the Committee. Under the Plan, the Committee is authorized to determine any question arising in the administration, interpretation and

application of the Plan, including the eligibility of retired employees to receive benefits under the Plan (Retirement Income Plan § 12.1; Ex. C, page 18). The Plan provides that a determination by the Committee within the scope of its authority is conclusive and binding on all persons concerned (Retirement Income Plan, § 12.1; Ex. C, page 18).

- 9. The funds contributed by employees and by participating companies constitute under the Plan a "Trust Fund," which is held by the trustees appointed pursuant to Section 13 of the Plan. Defendants Chemical Bank New York Trust Company ("Chemical Bank") and the Fifth Third Bank ("Fifth Third Bank") are the trustees appointed pursuant to Section 13 of the Plan. They have no discretion and make no determinations as to eligibility of individual employees to receive benefits under the Plan, but are merely a depository for the Trust Fund, receiving and holding deposits made by the companies and by employees and disbursing funds at the direction of the Committee, which has sole authority to administer the Plan.
- 10. Section 15.1 of the Plan provides that the establishment of the Plan gives no legal or equitable right to any person against any company participating in the Plan (Retirement Income Plan § 15.1; Ex. C, page 20), and Section 13.2 of the Plan provides that no participating company shall have any liability or responsibility under the Plan other than to make contributions to the Trust Fund (Retirement Income Plan, § 13.2;

Ex. C, page 19). The Plan also provides that, except for gross negligence or fraud, no liability shall be incurred by any stockholders, officers or members of the board of a company, subsidiary or affiliate, the Committee or any representatives appointed under the Plan (Retirement Income Plan, § 15.7; Ex. C, page 21).

- 11. Section 15.8 of the Plan states several conditions and presents several alternatives affecting the right of an employee to receive retirement benefits if he leaves the employ of a participating company and accepts employment with a firm selling the same products sold by the participating company which formerly employed him.
- or involve the disclosure or use of information gained in the course of his prior employment with a participating company, the employee continues to be eligible to receive his retirement benefits. If the Committee, however, determines that his new employment does require or involve the disclosure or use of such information, the employee will not be eligible for benefits unless he reasonably satisfies the Committee that his new employment does not require or involve the disclosure or use of such information. The burden of proof under § 15.8 is placed upon the employee.

  The employee may, of course, instead choose to receive the payment, with interest, of all the contributions he has made to the Plan. (Retirement Income Plan, §§ 15.8 and 18.3; Ex. C, pages 21-22 and 28.)

#### THE COMPLAINT

- 13. Basing the Court's jurisdiction on an alleged diversity of-citizenship, plaintiff charges that his benefits under the Plan have been wrongfully terminated by means of an alleged scheme in which the various defendants, for reasons unclear on the face of the complaint, have participated in (a copy of the complaint in this action is annexed hereto as Exhibit D). The relief sought ranges from compensatory damages in the amount of \$100,000, to rescission of the termination of plaintiff's benefits and reinstatement thereof, to reimbursement of plaintiff's counsel fees and other litigation expenses, to a total of \$785,000 in punitive damages in varying amounts from the several defendants. This extraordinary and far-reaching demand for relief, however, is unsupported by any pleaded factual basis. For the most part, the complaint is a jumbled hodge-podge of contradictory and often entirely unbelievable conclusions and accusations for which no factual particulars are or, indeed, could be supplied.
- 14. Plaintiff voluntarily resigned his position as a paper salesman for Nationwide on or about May 15, 1969, and commenced employment with Ris Paper Co. ("Ris") (Ex. D, para. 15). On or about July 11, 1969, the Committee sent plaintiff notice pursuant to Section 15.8 of the Plan that it had determined that his employment with Ris requires or involves the disclosure or use of knowledge or information gained in the course of his em-

ployment with Nationwide and that, as a result, his benefits under the Plan would be terminated unless plaintiff either ceased his employment with Ris or established to the Committee's reasonable satisfaction that his new employment does not require or involve the use of knowledge or information gained in the course of his employment with Nationwide (Ex. D, para. 16).

- 15. Paragraphs 16 through 23 of the complaint purport to review correspondence between plaintiff and the Committee which followed the July 11, 1969, notice of termination. Harking back to this alleged correspondence which took place in 1969 and 1970, the complaint unwittingly dramatizes the staleness of plaintiff's claim in this Court, which is, in effect, an archeological exploration of claims fully set forth two years ago in the State Court. Be that as it may, however, the texts of the various letters are not made part of the complaint, and the allegations of the complaint appear to set forth the conclusions which plaintiff draws from each letter rather than the substance thereof.
- paragraphs 16 through 23 of the complaint, however, it is clear that after nine months of correspondence, plaintiff had still failed to satisfy his burden under § 15.8 of the Plan of demonstrating to the Committee either that he had ceased his employment with Ris or that said employment does not require or involve the use of knowledge or information gained in the course of his employment with Nationwide. Accordingly, on June 29, 1970, the

Committee finally terminated plaintiff's benefits under the Plan and, shortly thereafter, sent plaintiff a check covering his contributions to the Plan plus interest (Ex. D, paras. 21 and 22). Plaintiff refused to accept the check and returned it uncashed to the Committee (Ex. D, para. 23).

accusations, unfounded in fact or in logic, levelled against the various defendants individually and collectively.\* Elements of conspiracy and breach of fiduciary obligations are interwoven in the pleading without an iota of factual basis for such charges. The defendants are alleged to have acted in concert to force plaintiff out of the paper business, to terminate his pension rights and to wrongfully withhold or misappropriate funds allegedly belonging to or set aside for plaintiff. How and when defendants sought to drive plaintiff from the paper business is not specified, nor is the motive for doing so stated. This factual gap is especially noteworthy in view of plaintiff's inconsistent admission in the complaint that he resigned -- apparently voluntarily -- his position with Nationwide (Ex. D, para. 15).

<sup>\*</sup> For example, Champion is claimed to be "in complete control of all the defendants" (Ex. D, para. 24). While "complete control" of Chemical Bank and Fifth Third Bank is a pleasing prospect, the probable subject of many an executive's fond reverie, it is simply not consonant with the facts in the case of Champion. The independence of the banks from Champion is established by fact and by repute, and it would certainly not be sacrificed for the sake of Mr. Herendeen's \$1,099.79 contribution to the Plan.

A further argument is suggested to the effect that plaintiff was discriminated against in that other employees who left Champion were not similarly deprived of their benefits. Yet no specifics of this alleged discrimination are offer. The complaint does not even contain a pro forma allegation to the effect that these unspecified employees were similarly situated, much less as to their identities, the nature of their employment with Champion and with their new employers and whether said new employment involves or requires the disclosure or use of knowledge or information gained in the course of their employment by Champion.

## THE MOTIONS TO DISMISS

implausible way in which plaintiff's purported claim is pleaded, there is one factor beyond dispute which requires dismissal of the complaint for failure to state a claim upon which relief can be granted. That factor is the Plan itself, which expressly bars this lewsuit and any claim which plaintiff can fashion against the defendants herein seeking compensatory or punitive damages. For plaintiff cannot seek enforcement of his rights under the Plan without himself abiding by the express provisions of the Plan. The instant motions to dismiss are keyed to these provisions, which are totally overlooked in the complaint.

## As to Champion and Nationwide.

19. In naming Champion and its dissolved subsidiary

Nationwide as defendants in this action, plaintiff has ignored two key provisions of the Plan, which expressly bar such a suit. Section 13.2 of the Plan provides:

"[N]o Company, Subsidiary or Affiliate shall have any liability or responsibility other than to make contributions to the Trust Fund as herein provided."

Section 15.1 of the Plan provides:

"The establishment of the Plan, or of any fund, or any insurance contract thereunder, or any modifications thereof, or the payment of any benefit hereunder, shall not be construed as giving any person whomsoever any legal or equitable right against a Company, Subsidiary, or Affiliate, or its officers, directors or shareholders, or as giving any person the right to be retained in the service of a Company, Subsidiary or Affiliate."

Plaintiff cannot both seek affirmation of his rights under the Plan and ignore the provisions thereof. Since the express provisions of the Plan bar any liability on the part of or recovery from Champion and Nationwide by reason of the Plan, the first and second Counts must be dismissed as to said defendants as inconsistent with provisions of the very contract which plaintiff seeks to enforce.

# As to Ch mical Bank and Fifth Third Bank.

20. In naming Chemical Bank and Fifth Third Bank as defendants in this action, plaintiff has ignored the function

of the trustees under the Plan. Section 2.1(h) of the Plan contains the following definition:

"'Trustee' means one or more corporations, persons, banks, or trust companies, or combination thereof, designated by the Companies to hold the Trust Fund."

Section 12.1 of the Plan provides:

"The Plan shall be administered by the Committee, which shall have such powers as may be delegated to it by the Presidents of the Companies, under rules uniformly and consistently applicable to all Participants under similar circumstances.

\* \* \* \*

"The Committee will certify, as necessary, the persons entitled to payments, and the amounts that are to be paid to each of them out of the Trust Fund, and will exercise the authority and carry out the duties set forth in the trust agreement. The Committee may determine any questions arising in the administration, interpretation and application of the Plan and trust agreement, including but without limitation, the eligibility and date of eligibility . of Employees, rights to participate, the amount by which any payment to be made hereunder should be reduced or increased, the age of an Employee or any other person, the earnings of any Employee, the date of termination of employment, and the number of months or years of Continuous Service to be used in determining the amount of retirement income to be paid. A determination by the Committee, within the scope of its authority, shall be conclusive and binding on all persons concerned.

Administration of the Plan is therefore placed solely in the hands of the Committee. For this reason, the trustees cannot have been a part of the alleged scheme of which plaintiff com-

plains. The trustees have no discretion in the determination of who is eligible for benefits, the amount of such benefits or any other question relating to the administration of the Plan.

Their function is purely ministerial: the trustees receive and hold such monies as the companies and employees contribute and disburse them at the direction of the Committee. Moreover, since plaintiff does not claim to be entitled to actual payment of any benefits under the Plan, his purported claim against the trustees is purely hypothetical and premature, since they cannot as yet have failed to disburse to plaintiff any funds due to him. Accordingly, since there is no present claim which plaintiff can have against the trustees, the first and second Counts must be dismissed for failure to state a claim against Chemical Bank and Fifth Third Bank upon which relief can be granted.

## As to the Committee.

21. Two independent grounds require dismissal of the first and second Counts as to the Committee. First, the Plan expressly provides that no liability for money damages may attach to the Committee. Section 15.7 of the Plan provides:

"It is declared to be the express purpose and intention of the Plan that no liability whatever shall attach to or be incurred by the stockholders, officers or members of the Board of Directors of a Company, Subsidiary or Affiliate, the Committee or any representatives appointed hereunder, under or by reason of any of the terms or conditions of the Plan. No person shall be liable for any act or failure to act hereunder except for gross negligence or fraud."

Plaintiff's attempt to recover compensatory and punitive damages from the Committee must therefore fail because such a claim is barred by the express terms of the Plan which plaintiff seeks to enforce.

22. Second, this action must be dismissed as to the Committee for lack of personal jurisdiction and for insufficiency of process and of service of process, pursuant to Rule 12(b)(2), (4) and (5) of the Federal Rules of Civil Procedure. The Committee is neither a corporation, nor a partnership, nor any other recognized legal entity, but is, rather, an unincorporated association. Counsel for the Committee informs me that pursuant to Rule 17(b) of the Federal Rules of Civil Procedure the capacity of an unincorporated association to sue or be sued in Federal Court is determined by the laws of the state in which the District Court is held. Under the law of New York, an unincorporated association cannot be sued in its collective name. Under New York common law, it could be brought into an action only by naming in the caption and serving with process each and every one of its members. Section 13 of the New York General Associations Law, in order to simplify the procedure for suing such an entity, has provided a simpler method of service. It permits suit against an unincorporated association by naming and serving its president, treasurer or equivalent officer. However, even under Section 13, an unincorporated association cannot be sued in its collective name, as plaintiff has here attempted. Section 13 provides, in material part:

"An action or special proceeding may be maintained, against the president or treasurer of such an association, to recover any property, or upon any cause of action, for or upon which the plaintiff may maintain such an action or special proceeding, against all the associates, by reason of their interest or ownership, or claim of ownership therein, either jointly or in common, or their liability therefor, either jointly or severally. Any partnership, or other company of persons, which has a president or treasurer, is deemed an association within the meaning of this section."

23. In suing and serving the Committee, therefore, plaintiff has failed in two distinct respects to comply with New York law as to the capacity of the Committee to be sued. First, as the summons and complaint indicate on their face, the Committee is sued here in its collective name. Second, the service of process attempted on the Committee does not accord either with New York common law or with Section 13. The United States Marshal's certificate and return on service of process filed in this action (a copy of which is annexed hereto as Exhibit E), indicates service was made on the Committee by delivering a copy of the summons and complaint to Clarke Adams in Hamilton, Ohio. Although Mr. Adams was chairman of the Committee at certain times prior to and during 1969, since that time he has not been an officer of the Committee but only one of its several members. Plaintiff has therefore failed to serve either each and every member in accordance with New York common law, or the chairman of the Committee, in accordance with Section 13 of the New York General Associations Law.

24. In fact, this precise question -- whether service on Mr. Adams is sufficient to give jurisdiction over the Committee under New York law -- was decided within the last month by Mr. Justice Jacob Markowitz, in the case of English v. U. S. Plywood-Champion Papers, Inc. in the Supreme Court of the State of New York, County of New York (Index No. 5572/1971). In that case the plaintiff sought to bring the Committee in as an additional party defendant by adding its collective name to the caption and serving Mr. Adams with process on behalf of the Committee, as plaintiff here has done. Granting the Committee's motion to dismiss for lack of personal jurisdiction, Justice Markowitz held that since Mr. Adams was no longer chairman of the Committee when served and since plaintiff did not even attempt to serve pursuant to common law, jurisdiction has not been obtained either under Section 13 or under common law. In his Decision, reported at p. 17, col. 1 of the May 14, 1974 New York Law Journal (a copy of this Decision is annexed hereto as Exhibit F), Justice Markowitz said:

"Motion by defendant, the Committee, Retirement Income Plan for Salaried Employees of certain subsidiaries of U. S. Plywood-Champion Papers, Inc., to dismiss for lack of personal jurisdiction is granted. Admittedly the person served with the summons and complaint on behalf of the movant was no longer the chairman of the Committee or any other officer of it when served. Pursuant to section 13 of the General Associations Law, which is applicable since the Committee falls within the classification therein of unincorporated associations, partnerships, or other company of persons, service has to be upon an officer, i.e., president or treasurer, or

the equivalent. Since jurisdiction has not been attained in accordance therewith, there is no jurisdiction. Plaintiff admits it did not attempt to serve the Committee pursuant to the common law, so no jurisdiction was acquired in this manner."

25. Plaintiff's purported service of process on the Committee is, therefore, fatally defective and inoperative as a matter of law to give this Court jurisdiction over the person of the Committee. The Committee cannot be joined as a party defendant to this action by simply including its name in the caption. The Committee cannot in fact be sued in its own name, and it cannot be served through Mr. Adams, who is not its present chairman.

# As to the unfounded claim for punitive damages.

of \$785,000 in punitive damages in varying amounts from the various defendants. I am informed by counsel that such a claim has no place under the law of New York as interpreted by the courts, both state and federal, in an action grounded essentially in contract. The accompanying memorandum of law demonstrates that under the law of New York, punitive damages are limited to cases involving grossly wanton acts of high moral culpability, aimed at the public generally, in which punitive damages are necessary to induce suit to right wrongs which otherwise would not be vindicated. This is hardly such a case. Irrespective of the motive for the breach, a breach of contract is not a case for punitive

damages. For this reason, plaintiff's claim for a total of \$785,000 in punitive damages must be dismissed for failure to state a claim upon which relief can be granted.

# THE ALTERNATIVE MOTION FOR A MORE DEFINITE STATEMENT

- several theories of recovery. They contain at least three claimed grievances: that the defendants conspired to drive plaintiff from the paper business and to terminate his pension rights (Ex. D, para. 26); that the defendants conspired to wrongfully withhold or misappropriate funds allegedly belonging to or set aside for plaintiff (id.); and that the Committee's termination of plaintiff's pension rights was discriminatory in that the pension rights of other alleged but unspecified employees were not terminated (Ex. D, para. 27, 28 and 29).
- 28. As the complaint stands, each defendant is left to guess at his peril as to what the alleged wrong actually is, what said defendant's role was in the wrong, and what the basis in fact, if any, is for the wrong. How and when defendants sought to drive plaintiff from the paper business is not specified, nor is the motive for doing so stated. Moreover, no specifics are given with respect to the alleged discrimination. The complaint does not even contain a pro forma allegation to the effect that the unspecified employees whose pension rights were not terminated were similarly situated to plantiff, an allegation essential to any claim of discrimination.

- 29. The complaint is therefore so vague and ambiguous, so improperly structured, that it generates confusion and uncertainty as to how many claims plaintiff actually intends to assert and it fails to apprise each of the defendants of the charges made against it. Although this pattern of guessing-game pleading is followed in the case of all the defendants, it is underscored in the case of the trustees, Chemical Bank and Fifth Third Bank. Plaintiff has embroiled these defendants in his vendetta against Champion on the sole basis of his own unelaborated assertion that said defendants took "action in furtherance" of the alleged scheme allegedly masterminded by Champion. What "action" was taken by the banks plaintiff fails to specify.
- the banks is all the more improper because so much of plaintiff's claimed grievance against the banks and, for that matter, against the other defendants as well, hinges on the astounding assertion that Champion "is in complete control" of all the defendants. The fact that plaintiff's entire thesis depends upon such a ludicrous assertion is no excuse for keeping the underlying facts a secret. If plaintiff is prepared to prove that two major banks and the Committee, which represents all Champion's employees, have become operating divisions of Champion, then the Court and the defendants are entitled to have the factual averments supporting plaintiff's contention spelled out.

- 31. Moreover, there is a further, independent ground why plaintiff must be required to amplify his pleading. As I have indicated (paras. 3-5, supra), this is not plaintiff's first lawsuit against Champion. In his previous suit in the New York courts, in which a judgment of dismissal was entered, the court held that plaintiff had no claim against Champion either in contract or in fraud. As plaintiff supplies the details of his claim in this Court, it may appear that the prior state action will be an absolute bar to this action by reason of res judicata.
- amplification of the complaint is an absolute necessity to the intelligent formulation of factual issues and defenses. Accordingly, I respectfully urge the Court alternatively to direct plaintiff to provide a more definite statement of his claim. Plaintiff should be required to separately state each claim for relief together with a plain and concise statement of the facts supporting each alleged claim.

## CONCLUSION

33. For all the foregoing reasons, and for the reasons set forth in the accompanying memorandum of law, I respectfully urge the Court to grant defendants' motions for an order dismissing each Count in plaintiff's complaint or, in the alter-

native, granting defendants a more definite statement of the claims asserted against them.

Jerry L. Brammer

Sworn to before me this all day of May, 1974.

Virginia Bletensie

VIRGHMA BLAKEMORE
Notary Public, Clate of Hew York
No. 514 (2000)

Qualified in New York County Commission Express Murch 30, 1976 UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JAMES W. HERENDEEN,

Plaintiff,

VERIFIED COMPLAINT

-against-

CHAMPION INTERNATIONAL CORPORATION;
NATIONWIDE PAPERS INCORPORATED; and
CHEMICAL BANK NEW YORK TRUST COMPANY;
THE FIFTH THIRD BANK, and the
COMMITTEE, as Administrator of the
Retirement Income Plan for Salaried
Employees of Certain Subsidiaries of
CHAMPION INTERNATIONAL CORPORATION,
Defendants.

Plaintiff complaining of the defendants by his attorneys, RUBIN, BOBROW, AGATSTON & SCHEFFLER, alleges as follows:

#### COUNT I

## AS AND FOR A FIRST CAUSE OF ACTION

- Plaintiff is a citizen of the United States and a resident of 100 Manhattan Avenue, Union City, in the State of New Jersey.
- 2. At all times here lifter mentioned, and upon information and belief, the defendant, CHAMPION INTERNATIONAL CORPORATION, referred to hereinafter as "Champion", was and still

is a corporation organized under the laws of the State of New York with an office and principal place of business in the City and County of New York.

- 3. At all times hereinafter mentioned and upon information and belief, the defendant, NATIONWIDE PAPERS INCORPORATED, hereinafter referred to as "Nationwide", is an Ohio corporation duly authorized to do business in the State of New York with an office and principal place of business in the County of New York.
- 4. At all times hereinafter mentioned and upon information and belief, the defendant, CHEMICAL BANK NEW YORK TRUST COMPANY, hereinafter referred to as "Chemical Bank", is a New York corporation with an office and principal place of business in the County of New York and is a Trustee of the Retirement Income Plan for Salaried Employees of Certain Subsidiaries of Champion International Corporation, hereinafter referred to as the "Plan".
- 5. At all times hereinafter mentioned and upon information and belief, the defendant, THE FIRST THIRD BANK, was and still is a Trustee of the Plan and a foreign corporation which administered the trust funds of the Plan located in the State of New York and which has an office and principal place of business in Cincinnati, Ohio.

- mation and belief, the defendant, the COMMITTEE as Administrator of the Plan, referred to herein as the "Committee", is a group of individuals designated from time to time to act in such capacity by Champion under the terms of the Plan and who as a group carry on within the State of New York for employees of Champion employed in the State of New York the duties and obligations bestowed upon them and assumed by them under the terms of the Plan.
  - 7. On or about November 1, 1954, plaintiff was employed in the State of New York by The Whitaker Paper Company ("Whitaker") and continuously thereafter was an employee of Whitaker and its successors in the State of New York, County of New York, to and until May 15, 1969.
  - 8. At the time of plaintiff's employment with Whitaker there was existing for the benefit of the employees of Whitaker The Whitaker Paper Company Pension Trust, established December 30 1942, as amended.
  - 9. As a result of plaintiff's employment by Whitaker, plaintiff became entitled to certain benefits under the terms and conditions of said pension trust.
  - 10. Upon information and belief, on or about July 1,
    1957, Whitaker amended the aforesaid pension trust for the benefit
    of its employees, which pension trust was thereafter known as the

Whitaker Paper Company's Employees Retirement Plan (hereinafter called "The Whitaker Plan").

- 11. Upon information and belief, on or about April 30, 1963, Whitaker was merged into Carpenter Paper Company, an Ohio corporation, thereafter known as Nationwide.
- 12. Upon information and belief, as a result of said merger, The Whitaker Plan was amended on or about April 29, 1963, to provide for continued benefits to the employees of Nationwide formerly employed by Whitaker.
- 13. Upon information and belief, Nationwide became and still is a subsidiary of Champion.
- 14. Upon information and belief, as a result of various mergers and acquisitions, The Whitaker Plan, effective as of July 1, 1965, was merged into and became part of the Plan.
- 15. On or about May 15, 1969, plaintiff resigned from Nationwide and commenced employment with Ris Paper Company, Inc., referred to hereinafter as "Ris".
- 16. On or about July 11, 1969, the Committee notified plaintiff that his employment with Ris requires or involves on plaintiff's part the disclosure or use of knowledge or information gained in the course of his employment with Nationwide and that therefore plaintiff's retirement benefits under the plan

would be cancelled or terminated in accordance with the provision of Section 15.8 of the Plan, if plaintiff did not cease such employment or establish to the reasonable satisfaction of the committee that the disclosure or use of knowledge or information gained in the course of his former employment with Nationwide is not required or involved in his present employment with Ris.

Committee, the plaintiff offered by letter dated September 2, 1969, to establish to the reasonable satisfaction of the Committee that his employment with Ris does not involve the disclosure or the use of knowledge or information gained in the course of his employment with Nationwide or any other subsidiary or predecessor company.

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- 18. By said letter of September 2, 1969, plaintiff also notified the Committee that its determination with respect to his employment by Ris was not consistent with respect to its determination in regard to other former employees of Champion and its subsidiaries, whose benefits under the Plan were not terminated under similar circumstances.
- 19. By letter dated February 27, 1970, from the Committee to plaintiff, the Committee rejected plaintiff's position set forth in his letter of September 2, 1969.
  - 20. By letter dated May 18, 1970, from the plaintiff

to the Committee, plaintiff rejected the Committee's determination.

- 21. By letter dated June 16, 1970, from the Committee to the plaintiff, the committee notified plaintiff of the termination in accordance with Section 15.8 of the Plan of the plaintiff's retirement benefits otherwise available to him at his retirement date under the Plan.
- 22. By letter dated June 29, 1970, from the Committee to the plaintiff, the Committee forwarded to plaintiff the check of THE FIFTH THIRD BANK, in the amount of \$1,099.79, as a refund of his contributions to the Plan with interest to such date.
- 23. By letter dated July 21, 1970, from the plaintiff to the Committee, plaintiff returned the check to the Committee and rejected the determination of the Committee with respect to his benefits under the plan.
- 24. Upon information and belief, Champion is in complete control of all the defendants herein and of all its subsidiaries.
- 25. Upon information and belief, Champion has full control and discretion to appoint and replace the Trustees of the Plan and to allocate from time to time the proportion of the assets to be held in trust by them under the Plan.
  - 26. Upon information and belief, all the defendants

have acted in concert, under the direction of Champion, to force plaintiff out of the paper industry, and to withhold from him, and thereby retain within the assets held by the Trustees, the monies and benefits to which he is entitled.

- 27. The Committee's aforesaid determination was erroneous and was arbitrarily and caproisously made and was made either without knowledge of the facts or in disregard thereof.
- violation of Section 5.5 of the Plan that requires the Committee:
  "In making any such determination, or enforcing any rule or
  regulation adopted by the Committee, the Committee shall pursue
  uniform policies applicable to all employees similarly situated
  and shall not discriminate in favor of any employee or group of
  employees."
- Section 5.5 of the Plan in view of the fact that, upon information and belief, other former employees of Champion or its subsidiaries or predecessor companies, who have been subsequently employed by other companies similar to Ris, have not been deprived of their benefits under the Plan.
- 30. Upon information and belief, the Trustees have wrongfully, illegally, and without cause, violated and breached

the provisions of the Plan by complying, without objection, with the Committee's purported cancellation and termination of plaintiff's vested rights and interest in the Plan and taking action toward such end.

- 31. Upon information and belief, Chemical Bank and
  The Fifth Third Bank as Trustees under the Plan have breached
  the terms and conditions of the Plan by agreeing to the wrongful
  termination of plaintiff's participation in the Plan by the
  Committee and by taking action in furtherance of such termination as aforesaid.
- 32. As a result of the foregoing, the plaintiff's rights and benefits under the Plan and the plaintiff's rights and benefits under a so-called Health Care Plan, a so-called Disability Income Plan and a so-called Death Benefit Plan, all of which are a part of the so-called Benefit Plans of Champion and its subsidiaries, of which the Plan is a part, have been prejudiced and impaired.
- 33. Plaintiff has duly performed all of the terms and conditions of the Plan on his part to be performed, except to the extent that performance has been rendered impossible by the acts and conduct of the defendants.
  - 34. As a result of the aforesaid outright, illegal

and wrongful violation and breach of the provisions of the Plan by the defendants, plaintiff has been damaged and will be deprived of the retirement benefits to which he is entitled as a full Participant with a vested interest in the Plan, as aforesaid, having upon information and belief, a present value of \$50,000., and has been deprived of the other benefits which were due to him as an employee and as a Participant in the Plan, under the Health Care Plan, Disability Income Plan, Death Benefit Plan and all other similar plans and benefits available to the Participants of the Plan in the additional amount, upon information and belief, of \$50,000.

#### COUNT II

# AS AND FOR A SECOND CAUSE OF ACTION

- 35. Plaintiff repeats and reiterates each and every allegation set forth in Paragraphs 1 through 34 inclusive hereof and makes same a part hereof with the same force and effect as if set forth at length herein.
- 36. Upon information and belief, the defendants, champion and Nationwide, by their agents and employees, did deliberately and without cause or justification induce the defendant Committee wrongfully to terminate plaintiff's participation in the Plan, as aforesaid.

- of the defendants, and more particularly the determination by the committee to cancel plaintiff's retirement benefits, and the inducement by Champion and Nationwide of the Committee to take such action were calculated and intended by the said defendants acting in concert to prevent the plaintiff from engaging in the only occupation in which he has been engaged during most of his adult life; and, by reason of the foregoing, the plaintiff claims the right to punitive damages from the defendants.
- 38. Upon information and belief, defendants did and continue to engage in a complicity, acting under the aegis of Champion, to discriminate among Participants in the Plan having vested interests therein and, when deemed desirable to defendants to prevent such Participants from asserting their rights by claiming that they must either continue to work at the will of Champion or its respective subsidiaries or find a position outside the paper industry, under penalty of their participation in the Plan being "cancelled".
- 39. Upon information and belief, each Trustee has a conflict of interest in accepting in trust, as a fiduciary, its allocation by Champion of its proportion of the assets available under the plan, but subject to the control of and by Champion, or

on its behalf, irrespective of the provisions of the Plan by which each Trustee is legally bound.

- 40. Upon information and belief, the Committee followed orders through the chain of command from the President of each Committee member's respective subsidiary of, and controlled by, Champion; and Nationwide actively carried out the discrimination and wrongdoing against plaintiff.
- 41. As a result of the foregoing, plaintiff is entitled to and demands exemplary damages from all of the defendants as hereinafter set forth.

WHEREFORE, plaintiff demands judgment as follows:

- 1. In the sum of '100,000. for the wrongful loss of the benefits due to plaintiff under the terms and conditions of the Plan, and that the Court:
- (a) Determine that the Committee by terminating plaintiff's benefits under the Plan violated the terms and conditions of the Plan and that such action should be rescinded and of no further force and effect.
- (b) Enjoin Champion and Nationwide from interfering or otherwise influencing the determination of the Committee as Administrator of the Plan with respect to the benefits due to the plaintiff under the Plan.

- (c) Enjoin the Trustees from taking any action to carry out the termination of plaintiff's benefits under the plan and direct them to hold and maintain the necessary assets under the terms and conditions of the plan for the benefit of plaintiff and to pay out to plaintiff, when and as due, the benefits to which plaintiff is entitled under the terms and conditions of the Plan.
- (d) Direct the Committee to take whatever action may be necessary to reinstate plaintiff as a Participant in the plan, entitled to all of the benefits vested in him as a Participant as of the termination of his employment with Nationwide on May 15, 1969.
- (e) Enjoin and restrain Champion and Nationwide from interfering in any way with the benefits due to plaintiff under the Plan and direct said defendants to take all action necessary to guarantee to plaintiff all of the rights and benefits which were due to him, as an employee, as a Participant in the Plan under the Health Care Plan, Disability Income Plan, Death Benefit Plan and all other similar plans and benefits available to the Participants of the Plan.

AND that the Court:

2. Award exemplary damages in favor of the plaintiff and against the defendants, as follows:

- (a) \$10,000. from Chemical Bank as a fiduciary,
- (b) \$10,000. from The Fifth Third Bank as a fiduciary,
- (c) \$ 5,000. from the Committee as Administrator of the Plan,
- (d) \$10,000. from Nationwide as an active member of the complicity in trying to force plaintiff out of the paper industry, plaintiff's only occupation during his adult life,
- (e) \$750,000. from Champion as exemplary damages

  . but in an amount deemed to be punitive
  in view of its financial position.

AND that the Court:

3. Grant to plaintiff such other and further relief as may be proper, together with the costs and disbursements of this action, including a fair and reasonable amount for counsel fees and other lawful expenses in connection with the prosecution of this action.

RUBIN, BOBROW, AGATSTON & SCHEFFLER

RV .

WALTER A. EOBROW Attorneys for Plaintiff Office and P.O. Address:

271 North Avenue,

New Rochelle, N. Y. 10801

Tel.: (914) 632-5050

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

JAMES W. HERENDEEN,

Plaintiff, :

- against -

NOTICE OF MOTION TO DISMISS AMENDED COMPLAINT

CHAMPION INTERNATIONAL CORPORATION; NATIONWIDE PAPERS INCORPORATED; and CHEMICAL BANK NEW YORK TRUST COMPANY; : (Judge MacMahon) THE FIFTH THIRD BANK, and the COMMITTEE, as Administrator of the Retirement Plan for Salaried Employees of Certain Subsidiaries of CHAMPION INTERNATIONAL CORPORATION,

74 Civ. 828

Defendants.

PLEASE TAKE NOTICE that upon the annexed affidavit of Jean Lucas, sworn to September 20, 1974, and the exhibits annexed thereto, defendants Champion International Corporation, Nationwide Papers Incorporated (which ceased to exist on or about January 1, 1970), Chemical Bank New York Trust Company, Fifth Third Bank and The Committee, Retirement Income Plan for Salaried Employees of Certain Subsidiaries of Champion International Corporation ("Plan"), will move this Court at Room 518 of the United States Court House, 40 Centre Street, New York, New York, on October 11, 1974, at 2:15 P.M., for an order, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure:

- A. dismissing each of the two counts in plaintiff's amended complaint on the ground that plaintiff has failed, as a matter of law, to set forth a claim of discrimination upon which relief can be granted. Moreover, plaintiff has failed to comply with the Court's directive requiring him to allege specifically and concretely the factual basis of his claim of discrimination. This default was inevitable in that the situation of each employee alleged in paragraphs 20 through 24 of the amended complaint to have been treated more favorably under the Plan than plaintiff, was materially different from plaintiff's situation when his rights under the Plan were terminated. Accordingly, plaintiff has failed to demonstrate that the Committee, or any defendant, has violated its contractual obligation under the Plan to "pursue uniform policies applicable to all employees similarly situated and [not to] discriminate in favor of any employee or group of employees."
  - B. dismissing each of the two counts in plaintiff's amended complaint:
  - Nationwide Papers Incorporated for failure to state a claim upon which relief can be granted on the ground that any claim for relief against said defendants is interdicted by the express terms of the Plan, under which plaintiff's claim is asserted and whose provisions plaintiff seeks to enforce. The Plan, by its very terms, is not to be "construed as giving any person whomsoever any legal or equitable right against a Company, Subsidiary or Affili-

ate" participating in the Plan, and under the Plan, "no Company, Subsidiary or Affiliate shall have any liability or responsibility other than to make contributions to the Trust Fund . . . " Plaintiff cannot seek to enjoy the Plan's benefits and at the same time to ignore its express terms and conditions. This action must therefore be dismissed for failure to state a claim against Champion and Nationwide upon which relief can be granted;

- Third Bank for failure to state a claim upon which relief can be granted on the ground that under the Plan their functions are purely ministerial, i.e. the receipt and disbursement of funds at the direction of the Committee which administers the Plan, and since plaintiff does not claim to be entitled presently to receive any benefits under the Plan, plaintiff cannot and has not specified any act by said defendants which has caused or could cause him injury; and
- Salaried Employees of Certain Subsidiaries of Champion International Corporation ("Committee") for failure to state a claim upon which relief can be granted on the ground that any claim for relief against said defendant is interdicted by the express terms of the Plan under which plaintiff's claim is asserted and whose provisions plaintiff seeks to enforce. Since plaintiff cannot seek enforcement of his rights under the Plan while ignoring its other terms and conditions, this action must be dismissed for failure to state a claim against the Committee upon which relief can be granted;

- complaint as to all defendants for failure to state a claim upon which relief can be granted on the ground that, as a matter of law, punitive damages are not available to plaintiff from any of the defendants by reason of the facts set forth in the amended complaint; and
- D. Granting defendants, and each of them, such other and further relief as the Court may deem just and proper.

Dated: New York, New York September 20, 1974

KRONISH, LIEB, SHAINSWIT, WEINER & HELLMAN()

A Member of the Firm
Attorneys for Defendants
1345 Avenue of the Americas

New York, New York 10019 Tel: (212) 765-6000

TO: RUBIN, BOBROW, AGATSTON
& SCHEFFLER
Attorneys for Plaintiff
271 North Avenue
New Rochelle, New York 10801

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK JAMES W. HERENDEEN, Plaintiff, : AFFIDAVIT IN SUPPORT - against -OF MOTION TO DISMISS : AMENDED COMPLAINT CHAMPION INTERNATIONAL CORPORATION; NATIONWIDE PAPERS INCORPORATED; and 74 Civ. 828 CHEMICAL BANK NEW YORK TRUST COMPANY; (Judge MacMahon) THE FIFTH THIRD BANK, and the COMMITTEE, as Administrator of the Retirement Plan for Salaried Employees of Certain Subsidiaries of CHAMPION INTERNATIONAL CORPORATION, Defendants.

STATE OF NEW YORK )

COUNTY OF NEW YORK )

JEAN LUCAS, being duly sworn, deposes and says:

1. I am Assistant Secretary of Champion International Corporation ("Champion"), one of the defendants in this action. I have personal knowledge of the matters set forth herein. This affidavit is respectfully submitted in support of the options of all the defendants for an order pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, dismissing each of the two counts in plaintiff's complaint as against all defendants for failure to state a claim upon which relief can be granted and for such other and further relief as the Court may deem just and and proper.

## BACKGROUND OF THIS LAWSUIT

Herendeen's litigation against Champion since his voluntary resignation five years ago.

- 2. This action is but the latest foray by plaintiff, James W. Herendeen, into litigation against Champion International Corporation and any of its subsidiaries, officers, employees and associates that Mr. Herendeen can entrap by his conclusory and often unbelievable allegations. This Court is but the latest forum to be plagued by Mr. Herendeen's crusade of annoyance and harassment. And the instant amended complaint is but the latest revised version of plaintiff's alleged grievance, which, despite repeated and bewildering shifts in theory, plaintiff has been unable to reduce to any legally cognizable claim for relief in any court, state or federal.
  - 3. Plaintiff is a former employee of Champion. He had been a paper salesman for Nationwide Papers Incorporated ("Nationwide")\* for several years when, in 1969, he voluntarily submitted his resignation. Thereafter, imagining himself somehow to be aggrieved by his own voluntary disassociation from Champion, Mr. Herendeen launched a crusade up and down the courts of New York State seeking redress against not only Champion, but several of its officers and employees, including Champion's Chairman of the

<sup>\*</sup> Nationwide ceased to exist on or about January 1, 1970. Its business is presently a division of Champion, which is successor in interest to Nationwide.

Board, claiming that he had been promised an employment contract. In his complaint in the Supreme Court of the State of New York, County of New York (a copy of which is annexed hereto as Exhibit A), Mr. Herendeen was not even able to specify such basic terms of the alleged contract as the salary he was supposed to receive and the duration of his employment under the alleged contract. In the state court, Mr. Herendeen sought damages of \$275,000 -- \$200,000 of which was characterized as "commissions and earnings in the commercial paper business" and the remaining \$75,000 as "the benefits of pension and health plans of Champion" (Ex. A, p.ra. 22).

4. Champion and the individual defendants moved in the state court to dismiss the complaint for failure to state a cause of action. That motion was granted by Mr. Justice Jacob Markowitz on November 30, 1972. In his Decision (a copy of which is annexed hereto as Exhibit B), Mr. Justice Markowitz held:

"The complaint does not allege that the parties entered into a binding agreement at any time; nor does it allege that at any time was there a meeting of the minds on the essential terms of such an agreement. To the contrary, plaintiff's basic position is that he was promise! (false though the promise may have been) that a written agreement would be entered into in the future . . .

"Representations that one will enter into such an agreement, false or not false, are not actionable, whether the cause of action is pleaded in fraud or in contract . . . " (citations omitted).

Pursuant to Mr. Justice Markowitz's Decision, judgment was entered dismissing plaintiff's state action on June 12, 1973. On appeal

to the Appellate Division, First Department, the order of dismissal was unanimously affirmed on May 17, 1973, without opinion. On July 3, 1973, the New York Court of Appeals denied plaintiff's motion for leave to appeal to that Court.

5. Stymied on all levels in the state courts and bound by a judgment holding that he has no cause of action either in contract or in fraud against Champion, plaintiff has now -- more than five years after his voluntary resignation from Champion's employ -- crossed the street to this Court seeking redress for the alleged wrongful cancellation of his benefits under the pension plan in which Champion's employees participate. Even this claim, however, is no stranger to litigation. It was also included in the state court complaint whose dismissal the highest court of New York refused to upset. The \$75,000 in damages which Mr. Herendeen claimed in the state court as "the benefits of pension and health plans of Champion" (Ex. A, para. 22) have here been ballooned to a total of \$885,000 in compensatory and punitive damages, claimed to be due from the various defendants named in this Court.

The Retirement Income Plan for Salaried Employees of Certain Subsidiaries of Champion International Corporation.

6. This action therefore involves a retirement income plan called, in 1969, the "Retirement Income Plan for Salaried Employees of Certain Subsidiaries of U.S. Plywood-Champion Papers Inc." (hereafter referred to as the "Plan" or the "Retirement Income Plan"). The Plan was established in 1965, when it was

known as the "Retirement Income Plan for Salaried Employees of Certain Subsidiaries of Champion Papers Inc." (a true copy of the Plan is annexed hereto as Exhibit C, together with copies of all amendments to the Plan).

- 7. The Plan provides for the payment of benefits to eligible retired employees of companies participating in the Plan from funds placed by the companies in trust with trustees. Eligible employees may, if they wish, elect to make contributions to the Plan as well, thereby increasing the benefits they may receive upon retirement (Retirement Income Plan §§ 4 and 7; Ex. C, pages 6-8, 9-13). If an employee has made voluntary contributions but is ineligible to receive benefits upon retirement, the amount of his contributions is returned to him with interest (Retirement Income Plan § 15.8; Ex. C, page 22).
- 8. The Plan is administered by defendant, the Committee. Under the Plan, the Committee is authorized to determine any question arising in the administration, interpretation and application of the Plan, including the eligibility of retired employees to receive benefits under the Plan (Retirement Income Plan § 12.1; Ex. C, page 18). The Plan provides that a determination by the Committee within the scope of its authority is conclusive and binding on all persons concerned (Retirement Income Plan, § 12.1; Ex. C, page 18).
- 9. The funds contributed by employees and by participating companies constitute under the Plan a "Trust Fund," which is held by the trustees appointed pursuant to Section 13 of the

Plan. Defendants Chemical Bank New York Trust Company ("Chemical Bank") and the Fifth Third Bank ("Fifth Third Bank") are the trustees appointed pursuant to Section 13 of the Plan. They have no discretion and make no determinations as to eligibility of individual employees to receive benefits under the Plan, but are merely a depository for the Trust Fund, receiving and holding deposits made by the companies and by employees and disbursing funds at the direction of the Committee, which has sole authority to administer the Plan.

- lishment of the Plan gives no legal or equitable right to any person against any company participating in the Plan (Retirement Income Plan § 15.1; Ex. C, page 20), and Section 13.2 of the Plan provides that no participating company shall have any liability or responsibility under the Plan other than to make contributions to the Trust Fund (Retirement Income Plan, § 13.2; Ex. C, page 19). The Plan also provides that, except for gross negligence or fraud, no liability shall be incurred by any stockholders, officers or members of the board of a company, subsidiary or affiliate, the Committee or any representatives appointed under the Plan (Retirement Income Plan, § 15.7; Ex. C, page 21).
  - and presents several alternatives affecting the right of an employee to receive retirement benefits if he leaves the employ of a participating company and accepts employment with a firm selling the same products sold by the participating company which formerly employed him.

or involve the disclosure or use of information gained in the course of his prior employment with a participating company, the employee continues to be eligible to receive his retirement benefits. If the Committee, however, determines that his new employment does require or involve the disclosure or use of such information, the employee will not be eligible for benefits unless he reasonably satisfies the Committee that his new employment does not require or involve the disclosure or use of such information. The burden of proof under § 15.8 is placed upon the employee. The employee may, of course, instead choose to receive the payment, with interest, of all the contributions he has made to the Plan.

(Retirement Income Plan, §§ 15.8 and 18.3; Ex. C, pages 21-22 and 28.)

# THE COURT'S DIRECTION THAT PLAINTIFF SERVE AND FILE AN AMENDED COMPLAINT

- 13. In his original complaint in this Court, plaintiff charged that his benefits under the Plan had been wrongfully terminated by means of an alleged scheme in which the various defendants, for reasons unclear on the face of the pleading, participated (a copy of the original complaint in this action is annexed hereto as Exhibit D). The facts out of which plaintiff deduced the existence of this alleged conspiracy may be simply stated.
- paper salesman for Nationwide on or about May 15, 1969, and commenced employment with Ris Paper Co. ("Ris") (Ex. D, para. 15).

On or about July 11, 1969, the Committee sent plaintiff notice pursuant to Section 15.8 of the Plan that it had determined that his employment with Ris requires or involves the disclosure or use of knowledge or information gained in the course of his employment with Nationwide and that, as a result his benefits under the Plan would be terminated unless plaintiff either ceased his employment with Ris or established to the Committee's reasonable satisfaction that his new employment does not require or involve the use of knowledge or information gained in the course of his employment with Nationwide (Ex. D, para. 16).

- purported to review correspondence between plaintiff and the Committee which followed the July 11, 1969 notice of termination.

  The texts of the various letters were not made part of the original complaint, and the pleaded allegations appeared to set forth the conclusions which plaintiff draws from each letter rather than the substance thereof.
- paragraphs 16 through 23 of the original complaint, however, it is clear that after nine months of correspondence, plaintiff had still failed to satisfy his burden under § 15.8 of the Plan of demonstrating to the Committee either that he had ceased his employment with Ris or that said employment does not require or involve the use of knowledge or information gained in the course of his employment with Nationwide. Accordingly, on June 29, 1970, the Committee finally terminated plaintiff's benefits under the

Plan and shortly thereafter sent plaintiff a check covering his contributions to the Plan plus interest (Ex. D, paras. 21 and 22). Plaintiff refused to accept the check and returned it uncashed to the Committee (Ex. D, para. 23).

- 17. The original complaint concluded with a series of conclusory accusations, unfounded in fact or logic, levelled against the various defendants individually and collectively. Flements of conspiracy and breach of fiduciary obligations were interwoven in the pleading without an iota of factual basis for such charges. The defendants were alleged to have acted in concert to force plaintiff out of the paper business, to terminate his pension rights and to wrongfully withhold or misappropriate funds allegedly belonging to or set aside for plaintiff. How and when defendants sought to drive plaintiff from the paper business was not specified, nor was the motive for doing so stated. This factual gap is especially noteworthy in view of plaintiff's inconsistent admission in the complaint that he resigned -- voluntarily -- his position with Nationwide (Ex. D, para. 15). A further argument was suggested to the effect that plaintiff was discriminated against in that other employees who left Champion were not similarly deprived of their benefits. Yet no specifics of this alleged discrimination were offered.
- 18. On July 12, 1974, defendants moved to dismiss the original complaint or, in the alternative, for a more definite statement thereof. The substantive basis for the motion to dismiss was twofold: (a) specific provisions of the Plan itself bar any recovery by plaintiff from any of the defendants, and (b) puni-

tive damages are not unavailable as a matter of law by reason of the facts set forth in the complaint. The alternate rotion for a more definite statement pointed out that from the pleading it was impossible to determine what the factual basis was for plaintiff's charges of fraud, conspiracy and discriminatory treatment. On July 18, 1974, the Court entered a Memorandum Endorsement, granting defendants' motion for a more definite statement and directing plaintiff to serve and file an amended complaint

'correcting the defects complained of and alleging the details desired by the defendants"

(a copy of the Court's Endorsement is annexed hereto as Exhibit E). The Court denied defendants' motion to dismiss with leave to renew following service of an amended complaint.

THE AMENDED COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

plaintiff's original complaint (a copy of the amended complaint is annexed hereto as Exhibit F). Like the original complaint, it levels charges of fraud and conspiracy, without setting forth an iota of factual support for any of them. Like the original complaint, it fails to disclose the motive for the alleged conspiracy to drive plaintiff out of the paper business. Like the original complaint, it balloons damages, which in the state court plaintiff had claimed to be \$75,000 for loss of his pension rights, to a total of \$885,000 in compensatory and punitive damages. But most significant of all, like the original complaint, the amended com-

plaint fails to overcome the threshold obstacle which was the basis of defendants' original motion to dismiss: plaintiff's claims for damages are barred by specific provisions of the very Plan whose provisions he seeks to enforce. This fatal defect, which has not been -- and can never be -- cured, requires dismissal of this action. Before addressing myself to this fundamental impediment which was the basis of defendants' previous motion to dismiss, I shall dispose of plaintiff's only apparent effort at "correcting the defects" of the original complaint and "alleging the details" missing therefrom.

Plaintiff has failed, as a matter of law, to set forth a claim of discrimination upon which relief can be granted. Moreover, plaintiff's discrimination claim is without factual basis in that the situation of each employee alleged to have been treated more favorably under the Plan than plaintiff was materially different from plaintiff's situation when his rights under the Plan were terminated.

various times propounded fraud, conspiracy, discrimination and gross negligence, among others, as the basis for the relief he seeks in this Court. Yet in the original complaint and in his papers opposing dismissal of the original complaint, plaintiff was unable to come forth with a single factual, non-conclusory averment supporting any one of these theories. In this connection, the amended complaint differs in one respect from the criminal pleading. Although the bewildering array of lurid but unsupported theories has by no means been eliminated, plaintiff purports to identify the other employees involved in his nebulous discrimina-

tion claim. In paragraphs 20 through 24 of the amended complaint, plaintiff identifies five employees whose pension rights were not terminated by the Committee when they left Champion's employ. The different treatment afforded these employees is presumably the basis of plaintiff's claim that he is the victim of discrimination.

- 21. Incontrovertible fact demonstrates that each of the five former employees specified in the amended complaint was in an entirely different situation vis-a-vis Champion from that of plaintiff and that the different treatment afforded these five enumerated employees resulted not from invidious discrimination but from the consistent application by the Committee of rational and uniform rules to all participants in the Plan. Plaintiff's stab at elaboration therefore serves the unintended useful purpose of demonstrating that the discrimination claim, like plaintiff's other conclusory allegations, is without any factual basis and is insufficient, as a matter of law, to state a claim for any relief in this Court.
- 22. Pursuant to its rule-making authority under Section 12.1 of the Plan, the Committee has followed a uniform practice of not enforcing the anti-competition strictures of Section 15.8 of the Plan against any Champion employee whose departure from Champion is considered involuntary. Involuntary departure can come about, for example, where the employee reaches the company-wide mandatory retirement age of sixty-five, or where the division in which the employee has worked is sold. On the other hand, where an employee's departure is considered voluntary, as in the case of Mr. Herendeen, who voluntarily resigned on May 15, 1969, the Committee's practice has been to enforce Section 15.8.

- 23. Incontrovertible evidence demonstrates that each of the five employees specified in paragraphs 20 through 24 of the amended complaint as the factual basis for plaintiff's discrimination claim left Champion's employ under circumstances which were clearly involuntary. Consistent with the rules uniformly applied in such cases by the Committee, Section 15.8 was not invoked against these five employees. The indisputable facts surrounding the departures of these five employees, and which made Section 15.8 inapplicable, are as follows.
- 24. Prior to December 31, 1967, Nationwide's business consisted of two segments, a commercial printing paper business and a book publishing products business. As of December 31, 1967, Nationwide sold its entire commercial printing paper business to Reinhold-Gould, Inc. ("Gould"), retaining for itself only the book publishing products business (a copy of the contract of sale between Gould and Nationwide is annexed hereto as Exhibit G).

  Pursuant to paragraphs 2 and 3 of the contract of sale, Nationwide retained four key employees, including plaintiff, who were the backbone of the book publishing products business. With respect to its remaining employees, Nationwide agreed to "give its best efforts to assure that all personnel involved in the commercial printing paper segment . . . shall remain with the commercial printing paper business purchased by Reinhold-Gould."
- 25. All five of the employees specified in the amended complaint were employed in Nationwide's commercial printing paper segment. After sale of that business to Gould, four of the employees, i.e. Benjamin F. Brown, Joseph Carpitano, Austin B. McKnight and Louis Grabow, became employees of Gould. Under these

circumstances, the Committee determined that invoking Section 15.8 against these four employees would have been inappropriate and, indeed, contrary to the underlying purpose of Section 15.8.

- 26. Several considerations entered into this determination. First, since Nationwide had sold the business in which they were employed, their departure was clearly involuntary. Under such circumstances, the Committee's consistent and long-standing policy was not to invoke Section 15.8. Second, invoking Section 15.8 would have been inconsistent with Nationwide's contractual obligation to use its best efforts to assure that all personnel involved in the commercial printing paper segment continued as employees of Gould. Since Mr. Herendeen was retained by Nationwide in its book publishing products business and since he was specifically excluded from the "best efforts" clause of the contract of sale (see contract of sale, Ex. G, para. 2), his situation was the precise opposite of that of Messrs. Brown, Carpitano, McKnight and Grabow. Accordingly, the Committee's decision to invoke Section 15.8 in Mr. Herendeen's case when he voluntarily resigned on May 15, 1969, was entirely consistent with its action in the other cases.
- Brown, Carpitano, McKnight and Grabow left Nationwide's employ made Section 15.8 inapplicable. Each of these employees was employed in the commercial printing paper business and left Nationwide for Gould in accordance with the contract of sale. As a result of the contract of sale, after December 31, 1967, Nationwide

and Gould were no longer competitors in the commercial printing paper business, since Nationwide had given up this business entirely. Indeed, under paragraph 12 of the contract of sale, Nationwide had licensed Gould to use Nationwide's trade names, trademarks and logos in the field. Since Nationwide and Gould were not in competition in the business which employed these four men, invoking Section 15.8 would not have furthered the underlying purpose of the Section, which is to discourage former employees from disclosing to competitors knowledge or information gained in the course of their employment with Nationwide. Mr. Herendeen's case, on the other hand, was quite different. When he resigned on May 15, 1969, his new employer was in active competition with Nationwide. Action under Section 15.8 was therefore entirely appropriate.

- 28. As to the fifth employee, C. William Arvidson, specified in paragraph 24 of the amended complaint, Mr. Arvidson retired effective August 1, 1966, having reached the age of sixtyfive. Since Champion has a company-wide mandatory retirement age of sixty-five applicable to all employees, Mr. Arvidson's departure was deemed involuntary and, in accordance with established rules uniformly enforced by the Committee, Section 15.8 was not invoked against him. Mr. Herendeen, on the other hand, resigned voluntarily, well before age sixty-five.
- 29. Each of the employees specified in the amended complaint was therefore in an entirely different situation from plaintiff's. The different treatment afforded these employees under

Section 15.8 was based on a rational and reasoned application of uniform and consistent rules to which all participants are subject. Mr. Herendeen's claim that he is the victim of discrimination is therefore without any factual basis. Therefore, I respectfully submit that in accordance with Section 12.1 of the Plan, the Committee's determination is conclusive and binding, and this action must be dismissed for failure to state a claim upon which relief can be granted.

Plaintiff has failed to cure the fatal defect noted with respect to his original complaint. The claims asserted in the amended complaint are barred by express provisions of the Plan under which said claims are asserted and whose provisions plaintiff seeks to enforce.

30. As I have noted (<u>supra</u> at para. 19), in the amended complaint plaintiff has failed to cure one fatal threshold defect which requires dismissal of this action. Plaintiff's claims for damages are barred by specific provisions of the very Plan plaintiff seeks to enforce. Plaintiff cannot seek enforcement of his rights under the Plan without himself abiding by its express provisions. The second ground for defendants' motion to dismiss is keyed to these provisions, which are ignored in the amended complaint, as they were in the original complaint.

## As to Champion and Nationwide:

31. In naming Champion and its dissolved subsidiary
Nationwide as defendants in this action, plaintiff has ignored two

key provisions of the Plan, which expressly bar such a suit. Section 13.2 of the Plan provides:

"[N]o Company, Subsidiary or Affiliate shall have any liability or responsibility other than to make contributions to the Trust Fund as herein provided."

Section 15.1 of the Plan provides:

"The establishment of the Plan, or of any fund, or any insurance contract thereunder, or any modifications thereof, or the payment of any benefit hereunder, shall not be construed as giving any person whomsoever any legal or equitable right against a Company, Subsidiary, or Affiliate, or its officers, directors or shareholders, or as giving any person the right to be retained in the service of a Company, Subsidiary or Affiliate."

Plaintiff cannot both seek affirmation of his rights under the Plan and ignore the provisions thereof. Since the express provisions of the Plan bar any liability on the part of or recovery from Champion and Nationwide by reason of the Plan, the first and second counts must be dismissed as to said defendants as inconsistent with provisions of the very centract which plaintiff seeks to enforce.

# As to Chemical Bank and Fifth Third Bank:

32. In naming Chemical Bank and Fifth Third Bank as defendants in this action, plaintiff has ignored the function of the trustees under the Plan. Section 2.1(h) of the Plan contains the following definition:

"'Trustee' means one or more corporations, persons, banks, or trust companies, or combination thereof, designated by the Companies to hold the Trust Fund."

Section 12.1 of the Plan provides:

"The Plan shall be administered by the Committee, which shall have such powers as may be delegated to it by the Presidents of the Companies, under rules uniformly and consistently applicable to all Participants under similar circumstances.

\* \* \*

"The Committee will certify, as necessary, the persons entitled to payments, and the amounts that are to be paid to each of them out of the Trust Fund, and will exercise the authority and carry out the duties set forth in the trust agreement. The Committee may determine any questions arising in the administration, interpretation and application of the Plan and trust agreement, including but without limitation, the eligibility and date o. ligibility of Employees, rights to participate, the amount by which any payment to be made hereunder should be reduced or increased, the age of an Employee or any other person, the earnings of any Employee, the date of termination of employment, and the number of months or years of Continuous Service to be used in determining the amount of retirement income to be paid. A determination by the Committee, within the scope of its authority, shall be conclusive and binding on all persons concerned."

Administration of the Plan is therefore placed solely in the hands of the Committee. For this reason, the trustees cannot have been a part of the alleged scheme of which plaintiff complains. The trustees have no discretion in the determination of who is eligible for benefits, the amount of such benefits or any other ques-

tion relating to the administration of the Plan. Their function is purely ministerial: the trustees receive and hold such monies as the companies and employees contribute and disburse them at the direction of the Committee. Moreover, since plaintiff does not claim to be entitled to actual payment of any benefits under the Plan, his purported claim against the trustees is purely hypothetical and premature, since they cannot as yet have failed to disburse to plaintiff any funds due to him. Accordingly, since there is no present claim which plaintiff can have against the trustees, the first and second counts must be dismissed for failure to state a claim against Chemical Bank and Fifth Third Bank upon which relief can be granted.

#### As to the Committee:

33. The Plan expressly provides that no liability for money damages may attach to the Committee. Section 15.7 of the Plan provides:

"It is declared to be the express purpose and intention of the Plan that no liability whatever shall attach to or be incurred by the stockholders, officers or members of the Board of Directors of a Company, Subsidiary or Affiliate, the Committee or any representatives appointed hereunder, under or by reason of any of the terms or conditions of the Plan. No person shall be liable for any act or failure to act hereunder except for gross negligence or fraud."

Plaintiff's attempt to recover compensatory and punitive damages from the Committee must therefore fail because such a claim is

barred by the express terms of the Plan which plaintiff seeks to enforce.

Plaintiff's claim for punitive damages is unfounded in fact or in law. Punitive damages are not available for a breach of contract.

\$7.85,000 in punitive damages in varying amounts from the various defendants. I am informed by counsel that such a claim has no place under the law of New York as interpreted by the courts, both state and federal, in an action grounded essentially in contract. The accompanying memorandum of law demonstrates that under the law of New York, punitive damages are limited to cases involving grossly wanton acts of high moral culpability, aimed at the public generally, in which punitive damages are necessary to induce suit to right wrongs which otherwise would not be vindicated. This is hardly such a case. Irrespective of the motive for the breach, a breach of contract is not a case for punitive damages. For this reason, plaintiff's claim for a total of \$7.85,000 in punitive damages must be dismissed for failure to state a claim upon which relief can be granted.

#### CONCLUSION

35. For all the foregoing reasons, and for the reasons set forth in the accompanying memorandum of law, I respectfully urge the Court to grant defendants' motions for an order dismissing each count in plaintiff's complaint for failure to state a claim upon which relief can be granted.

Jean Lucas

Sworn to before me this

and the day of September, 1974.

Notary Public

Notary Public State of New York
No. 41-0453510

Qualified in Queens County
Commission Expires March 30 1991

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NEW YORK

JAMES HERENDEEN,

Plaintiff,

VERIFIED COMPLAINT

-against-

U.S. PLYWOOD-CHAMPION PAPERS, INC.,
NATIONWIDE PAPERS INCORPORATED,
KARL R. BENDETSEN, RICHARD W. LOWRY,
JAMES S. BENTON, HARRY C. LAWLESS, JR.,
and GEORGE H. WATKINS,

Defendants.

Plaintiff, by his attorneys, RUBIN, BOBROW, AGATSTON & TIEFENBRUN, complaining of the defendants, alleges:

FIRST: That, upon information and belief, defendant

U. S. Plywood-Champion Papers, Inc. hereinafter referred to as

Champion is a corporation duly organized and existing under the

Laws of the State of New York.

SECOND: That, upon information and belief, defendant
Nationwide Papers In orporated, hereinalter referred to as
Nationwide is or was a corporation organized and existing under
and by vi tue of the laws of the State of Ohio and is or was
authorized to do business as a corporation in the State of New
York.

THIRD: That, upon information and belief, at all times

or part of the times hereinafter mentioned, the defendants

Karl R. Bendetsen, Richard W. Lowry, James S. Benton, Harry C.

Lawless, Jr., and George H. Watkins were offices or employees

of Champion and Nationwide.

FOURTH: That, upon information and belief, at all times hereinafter mentioned, Nationwide was a wholly owned subsidiary of Champion ask was under the control of Champion, its officers and directors and employees.

FIFTH: That beginning in or about November 1954, plaintiff was an employee of The Whitaker Paper Company and was employed as a paper salesman until February 28, 1962.

SIXTH: That, upon information and belief, on or about February 28, 1962, The Whitaker Paper Company was acquired by Inter-Paper Company, which was a wholly owned subsidiary of Champion, and which Champion caused to be renamed Whitaker Paper Company.

SEVENTH: That, upon information and belief, during or about the year 1963, Champion merged Whitaker Paper Company into Carpenter Paper Company, also a wholly owned subsidiary of Champion.

EIGHTH: That, upon information and belief, during or about 1963, at the time of the merger of Inter-Paper Company into Carpenter Paper Company, Champion renamed the resulting corporation

Nationwide Papers Incorporated, one of the defendants in this action.

NINTH: That during all the times above set forth, plaintiff continued to be employed by Whitaker Paper Company and the various corporations into which it was merged and continued to be employed by Nationwide until approximately May 15, 1969.

TENTH: That plaintiff was continuously employed by the various corporations as above set forth as a salesman of paper primarily to the book trade and the commercial trade and earned commissions in excess of \$50,000. per year.

about 1965, the U.S. Government instituted a Civil Anti Trust
Action against Champion, which resulted in a consent decree in
August, 1968, requiring Champion to dispose of paper merchant
houses previously acquired by it and then being operated by
Champion through Nationwide.

TWELFTH: That The whitaker Paper Company, Whitaker

Paper Company, Inter-Paper Company and Carpenter Paper Company

and Nationwide were all paper merchant houses and plaintiff's

employment at all times was by a paper merchant house.

THIRTEENTH: That, upon information and belief, during or about September 1967, Champion and Nationwide arranged with

Reinhold-Gould, Inc. another paper merchant house for Champion to sell and Reinhold-Gould, Inc. to purchase all the assets and business of Nationwide, except the book trade paper business, and said business and assets were acquired by Reingold-Gould, Inc.

Nationwide's business by Reinhold-Gould, Inc., plaintiff was directed and induced by the defendants to continue his employment with Nationwide as a paper salesman and other paper salesman previously employed by Nationwide were induced by defendants to enter the employ of Reinhold-Bould, Inc.

was induced and directed by defendants to relinquish and give up all his commercial paper accounts and to forego the commissions thereon upon the representation by defendants that plaintiff would receive a written contract of employment under the terms of which he would receive a minimum of \$40,000. per year, plus all expenses and that he would continue to receive all his benefits as an employee of Champion or its subsidiaries and as a member of the Retirement Plan and Health Plan of Champion.

SIXTHENTH: That, upon information and belief, at the time of the making of the said representations, the defendants had no intention of honoring said representations and of having

the plaintiff continue in the employ of Nationwide and the representations made by them with respect to the continued employment, the issuance of a written contract of employment, the continuation of plaintiff's participation in the Pension and Health Care plans were all false and fraudulent and part of a conspiracy among the defendants designed to induce plaintiff to give up his commissions on the commercial paper business and to force him to leave the employ of Nationwide and to deprive him of his Pension and Health Care benefits.

SEVENTEENTH: That thereafter, and during or about April 1969, plaintiff discovered the falsity of said representations, when the defendant employers of Nationwide and Champion admitted the falsity of said representations to plaintiff and advised plaintiff that no agreement of employment would be given plaintiff.

ance of the conspiracy to drive plaintiff from his employment by Nationwide and to prevent him from engaging in the commercial trade paper business and to deprive him of the benefits of its Pension Plan and Health Care Plan, the defendants have caused the Trustees of said Plans to refuse benefits to the plaintiff and said refusal is wrongful, illegal and without cause.

NIMETEENTH: That thereafter and on or about May 15, 1969, as a result of the wrongful acts of the defendants and the

conspiracy in which they had engaged, plaintiff resigned as an employee of Nationwide.

TWENTIETH: That on or about May 15, 1969, plaintiff entered upon his present employment with Ris Paper Company, Inc., another paper merchant house.

TWENTY-FIRST: That since his employment by Ris Paper Co., plaintiff has been unable to reinstate his commission business in the commercial trade field, which he had been forced to surrender, as above set forth, by reason of the fraudulent misrepresentations and conspiracy of defendants.

TWENTY-SECOND: That by reason of the wrongful acts of the defendants, the plaintiff has been deprived of commissions and earnings in the commercial paper business in the amount of \$200,000., and the benefits of Pension and Health Plans of Champion, in the amount of \$75,000.

WHEREFORE, plaintiff demands judgment against the defendants in the amount of \$275,000., together with the costs and disbursements of this action.

RUBIN, BOBROW, AGATSTON & TIEFENBRUN Attorneys for Plaintiff 271 North Avenue New Rochelle, New York (914) NE 2-5050 

#### MR. JUSTICE MARKOWITZ

HERENDEEN V. U. S. PLYWOOD-HERENDEEN V. U. S. PLIWOODE CHAMPION PAPERS, INC.—Defend-ants, other than defendant Watkins, move to dismiss the complaint as legally insufficient and as barred by the Statute of Frauds (Gen. Oblig. Law

he would continue to receive all his benefits as an employee of Chempion or its subsidiaries — " " Plaintiff further alleges that, when made, defendants had no intention of honoring the representations; that the representations were false; and that he discovered the falsity of the representations in or about April of 1969. About a month thereaft—plaintiff resimed as an employee of defendants' wroinful acts. The basic defect in the complaint is that the representations complaint is that the representations complaint of were promissor, in nature. As such, the complaint alleges an agreement to agree, when for ceable until it crystalizes into a binding agreement, rather than an action in fraud.

The complaint does not allege that the parties entered into a binding agreement at any time; nor does it allege that at any time there was a meeting of the minds on the essential terms of such an agreement. To the contrary, plaintiff's basic position is that he was promised (false though the promise may have been) that a written agreement would be entered into in the future.

written agreement would be entered into in the future.

Implicit in such a promise is that no such agreement would be binding until written. " • " if the parties to an agreement do not intend it to be binding upon them until it is reduced to writing and signed by both of them, they are not bound and may not be held liable until it has been written out and signed." (Scheck v. Frances, 26 N. Y. 2d. 466; accord, Brause v. Goldman, 10 A. D. 2d 323, aff d 9 N. Y. 2d 620).

Purther, while the complaint does not contain an explicit elegation of the term of the promised employment contract. If the proposed contract was intended to be for more than a one-year period, the oral agreement to grant it, or to employ planning for such a period, would be unenforceable, as in violation of the Statute of Frauds (Gr., Oblig, Law sec. 5-701(11). Such an alleration, that is, that the term of plaintings proposed contract would be for more than a period of one year, is clearly implicit in a fair reading of the complaint. Hence, the complaint is also defective for this reason.

Representations that one will enter into such an agreement, false or not false, are not actionable, whether the cause of action is pleaded in fraud or in contract (Subirana v. Munds, 282).

or in contract (Subirana v. Munds, 282)

N. Y. 726, 727; Redlark Realty Corp.
v. Minkin, 306 N. Y. 7621, A. S. Rawpell, Inc. v. Hyster Co., 3 N. Y. 24, 369,
cited by plaintiff, is distinguishable.
That case involved the tortious inducement by a third party of one with
whom plaintiff had a contract, to
breach that contract, to plaintiff s
damage. Nor is this a case where a
former employee is charged with
whomefully appropriating an employer's business or customers as in Duane
Jones Co. v. Burke, (306 N. Y. 172). No
such problems are presented by the
complaint at bar, We deal here with a
dispute between plaintiff and his own
employer and its officers.

employer and its officers.

The complaint fails to allege an enforceable cause of action and defendants' motion is granted.

Settle order.

PAGES 1-3 and 17-22 of EXHIBIT C TO THE NOTICE OF MOTION

# RETIREMENT INCOME PLAN FOR SALARIED EMPLOYEES OF CERTAIN SUBSIDIARIES OF CHAMPION PAPERS INC.

#### Section 1. Establishment of the Plan

1.1 The COMPANIES (which are the Companies as defined below) have established, effective as of July 1, 1965, a Plan as described herein and which, as it may be modified or amended from time to time, shall be known as "RETIREMENT INCOME PLAN FOR SALARIED EMPLOYEES OF CERTAIN SUBSIDIARIES OF CHAMPION PAPERS INC." (hereinafter referred to as the "Plan").

The Plan is an amendment, consolidation and restatement of certain plans maintained by the Companies prior to July 1, 1965, to the extent that such plans applied on June 30, 1965 to persons covered hereunder on and after July 1, 1965. The plans referred to in the preceding sentence are:

Paper Merchants Retirement and Disability Plan
Paper Merchants Employees' Profit Sharing Fund
Buffalo Envelope Company Pension Plan for Hourly Employees
Buffalo Envelope Company Pension Plan for Salaried Employees
Whitaker Paper Company Employees' Retirement Plan
Retirement Pension Plan for Employees of Carpenter Paper Company.

Except for "Retirement Pension Plan for Employees of Carpenter Paper Company", all of the plans named in the preceding sentence are funded plans, qualified under Section 401 of the Internal Revenue Code. Any or all of such plans may be collectively referred to herein as the "Consolidated Plans".

- 1.2 Any benefit payable under the Consolidated Plans to any person by reason of the occurrence, prior to July 1, 1965, of the retirement, disability, death, termination of employment or the attainment of age 65 of an Employee shall continue to be subject to the provisions of said plans as in effect on June 30, 1965.
- 1.3 Any benefit payable to any person by reason of the occurrence, on or after July 1, 1965, of the retirement, disability, death or termination of employment of an Employee covered hereunder shall be subject to the provisions of this Plan.

#### Section 2. Definitions

2.1 Definitions. Whenever used in the Plan, the following terms

shall have the respective meanings set forth below, unless otherwise expressly provided herein, and when the defined meaning is intended, the term is capitalized:

(a) "Company" means any of the following named corporations:

Nationwide Papers Incorporated, an Ohio corporation; Buffalo Envelope Company, Inc., a New York corporation; Champion Paper Export Corporation, a New York corporation;

or any successors thereto, and any other corporation which may from time to time adopt the Plan.

- (b) "Subsidiary" means any subsidiary of a Company designated as such for the purpose of the Plan by the Committee from time to time.
- (c) "Affiliate" means any employer designated as such for the purpose of the Plan by the Committee from time to time from among those in which a Company has a beneficial interest.
- (d) "Associated Company" means any Company, parent, subsidiary, or affiliate of a Company designated as such for the purpose of the Plan by the Committee from time to time.
- (e) "Committee" means the person or persons appointed by the Presidents of the Companies to administer the Plan.
- (f) "Plan" means the Retirement Income Plan For Salaried Employees of Certain Subsidiaries of Champion Papers Inc. as effective on and after July 1, 1965.
- (g) "Trust Fund" means all money, securities, and other property held by the Trustee under the Plan.
- (h) "Trustee" means one or more corporations, persons, banks, or trust companies, or combination thereof, designated by the Companies to hold the Trust Fund.
- (i) "Employee" means any person employed by a Company as a "regular Salaried employee", including a salesman

who is paid in whole or in part on a commission basis, at such locations as may be designated from time to time by the Presidents of the Companies for participation under this Plan (which may include Subsidiaries or Affiliates). A "regular Salaried employee" means any employee who qualifies as "regular" under the applicable personnel policy of the Company, Subsidiary or Affiliate, and whose pay is customarily computed on a weekly, bi-weekly or monthly basis, excluding, however, those employees whose work is customarily temporary, seasonal or migratory in nature, those employees of an Affiliate whose work, in the opinion of the Presidents of the Companies, is not performed for or at the convenience of the Company or a Subsidiary, and those employees who are members of a collective bargaining unit unless and until the Plan has been accepted by their duly authorized representatives and their inclusion under the Plan has been approved by the Presidents of the Companies.

- "Participant" means any Employee who has met the eligibility requirements of Section 3 hereof. The term "Participant" also shall include a terminated Employee, a retired Employee, and an Employee who is transferred to an Associated Company, so long as such terminated, retired or transferred Employee remains entitled to benefits under the Plan.
- (k) "Continuous Service" means the period of continuous, regular, full-time employment with the Company, a Subsidiary, an Affiliate, or an Associated Company, including such service with any of their predecessors as may be specified as "continuous service" or "credited service" under any of the Consolidated Plans, and also including any periods of Long-Term Disability and the 180 days immediately preceding such Long-Term Disability.
- (1) "Earnings" means the total compensation paid to an Employee by the Company, a Subsidiary or an Affiliate for services rendered, including, but not by way of limitation, regular salary and the following percentage of commissions (or of regular salary and commissions combined if the Employee is paid both salary and commissions), but not including any pay for overtime hours worked, shift bonuses, premium pay or any other

10.5 Incompetency. Every person receiving or claiming benefits under the Plan shall be conclusively presumed to be mentally competent until the date on which the Committee receives a written notice, in a form and manner acceptable to the Committee, that such person is incompetent and that a guardian, conservator, or other person legally vested with the care of his person or estate has been appointed; provided, however, that if the Committee shall find that any person to whom a benefit is payable under the Plan is unable to care for his affairs, any payment due (unless a prior claim therefor shall have been made by a duly appointed legal representative) may be paid to the spouse, a child, a parent, a brother or sister, or to any person deemed by the Committee to have incurred expense for such person otherwise entitled to payment. Any such payment so made shall be a complete discharge of liability therefor.

In the event a guardian or conservator of the estate of any person receiving or claiming benefits under the Plan shall be appointed by a court of competent jurisdiction, retirement payments may be made to such guardian or conservator provided that proper proof of appointment and continuing qualification is furnished in a form and manner acceptable to the Committee. Any such payment so made shall be a complete discharge of any liability therefor.

#### Section 11. Non-Alienation of Benefits

the Plan shall not be subject in any manner to alienation, sale, transfer, assignment, pledge, attachment, garnishment, or encumbrance of any kind. Any attempt to alienate, sell, transfer, assign, pledge, or otherwise encumber any such benefit, whether presently or thereafter payable, shall be void. Any benefit or fund hereunder shall not in any manner be liable for or subject to the debts or liabilities of any Participant entitled to any benefit. If the Participant shall attempt to alienate, sell, transfer, assign, pledge, or otherwise encumber his benefits under the Plan, or any part thereof, or if by reason of his bankruptcy or other event happening at any time, then the Committee, in its discretion, may terminate his interest in any such benefit, and hold or apply it to or for the benefit of such person, his spouse, children, or other dependents, or any of them, in such manner as the Committee may deem proper.

#### Section 12. Administration

12.1 Administration. The Plan shall be administered by the

Committee, which shall have such powers as may be delegated to it by the Presidents of the Companies, under rules uniformly and consistently applicable to all Participants under similar circumstances. The Committee may appoint agents and representatives, including subcommittees, to act on its behalf, and may delegate to such agents, representatives or subcommittees any part or all of the powers of the Committee. Any action taken by such an agent, representative or subcommittee shall be considered to be the action of the Committee, when such agent, representative or subcommittee is acting within the scope of the authority delegated to it by the Committee. All reasonable expenses incurred in administering the Plan shall be paid by the Company upon authorization by the Committee.

The Committee is authorized to obtain and rely upon actuarial data and computations from any recognized actuary, and may establish the assumptions upon which such data and computations are to be based. The Committee will certify, as necessary, the persons entitled to payments, and the amounts that are to be paid to each of them out of the Trust Fund, and will exercise the authority and carry out the duties set forth in the trust agreement. Subject to the provisions of the trust agreement, the Committee may determine any questions arising in the administration, interpretation and application of the Plan and trust agreement, including but without limitation, the eligibility and date of eligibility of Employees, rights to participate, the amount by which any payment to be made hereunder should be reduced or increased, the age of an Employee or any other person, the Earnings of any Employee, the date of termination of employment, and the number of months or years of Continuous Service to be used in determining the amount of retirement income to be paid. A determination by the Committee, within the scope of its authority, shall be conclusive and binding on all persons concerned.

#### Section 13. Financing

shall be provided through such trusts and/or insurance contracts as the Companies in their discretion may establish or cause to be established or entered into for the purpose of carrying out the Plan, or through such employee benefit trusts of the Companies as may be in existence on July 1, 1965 and from time to time thereafter. The Companies shall determine the form and terms of any trust agreement from time to time, and may remove any Trustee and select a successor Trustee or Trustees, or may terminate any such trust agreement.

shall be remitted to the Trustee to be held in the Trust Fund. During the continuance of the Plan and for the purpose of providing for the benefits contemplated under the Plan, the Companies, on behalf of themselves and their Subsidiaries and Affiliates, shall pay, from time to time, to the Trust Fund, such sums of money which, together with earnings of the Trust Fund and the contributions of Participants, shall be deemed sufficient to provide the benefits of the Plan. That part of each contribution made by a Company attributable to a Subsidiary or Affiliate, shall be paid by such Subsidiary or Affiliate to the Company. There shall be transferred to the Trust such assets as were previously held by the Trustees of the Consolidated Plans.

All benefits payable under the Plan shall be paid or provided for solely from the Trust Fund or insurance contracts, and no Company, Subsidiary or Affiliate shall have any liability or responsibility other than to make contributions to the Trust Fund as herein provided.

- 13.3 Non-Reversion. No Company, Subsidiary or Affiliate, shall have any right, title or interest in the contributions attributable to it under the Plan and no part of the Trust Fund shall revert to a Company, Subsidiary, or Affiliate, except that any funds remaining in the Trust Fund because of an erroneous actuarial computation, and after the satisfaction of all fixed and contingent liabilities under the Plan upon termination of the Plan and the allocation and distribution of the Trust Fund as provided herein, may revert to a Company, Subsidiary or Affiliate.
- A Company may, at its own expense at any time or from time to time, cause an examination of the books and records of the Plan and of the Trust Fund, to be made by such attorney, accountants, auditors, or other agents of the Company as the Company shall select for that purpose and may cause a report of such examination to be made to the Company.

#### Section 14. Approval Under Internal Revenue Code

are intended to meet the requirements of Section 401(a) of the Internal Revenue Code as now in effect or hereafter amended, so that the income of the Trust Fund may be exempt from taxation under Section 501(a) of the Code and contributions of the Companies, Subsidiaries, and Affiliates, may be deductible for Federal Income Tax purposes under Section 404 of the Code as now in effect or hereafter amended. Any modification or

amendment of the Plan may be made retroactive as necessary or appropriate, to establish or maintain such qualifications.

#### Section 15. Miscellaneous

- of the Plan, or of any fund, or any insurance contract thereunder, or any modifications thereof, or the payment of any benefit hereunder, shall not be construed as giving any person whomsoever any legal or equitable right against a Company, Subsidiary, or Affiliate, or its officers, directors or shareholders, or as giving any person the right to be retained in the service of a Company, Subsidiary or Affiliate. The right of a Company, Subsidiary or Affiliate, to discipline or discharge an Employee shall not be affected by reason of any of the provisions of the Plan.
- 15.2 Reemployment. If a Participant's employment with a Company, Subsidiary or Affiliate, is terminated and he is later reemployed, he shall be considered a new employee for the purposes of the Plan, and all the provisions of the Plan shall apply separately to each period of his Continuous Service.
- 15.3 Applicable Law. The Plan and all rights hereunder shall be governed, construed and administered in accordance with the laws of the State of Ohio.
- entitled to benefits hereunder be unknown, or unascertainable after reasonable inquiry, for a period of five years after the person was entitled to a payment hereunder, then, in such event, all interest hereunder of such person shall be deemed forfeited as of the beginning of such five year period and he shall not be entitled to any benefits or payments hereunder. For put oses of this Subsection 15.4, mailing a registered letter at the beginning and end of such five year period to the last known address of the person shall constitute reasonable inquiry.
- depletion as a result of litigation, in the event that any Participant shall bring any legal or equitable action arising under the Plan against the Trustee, or in the event that the Trustee may find it necessary to bring any legal or equitable action arising under the P'an against any Participant or any person claiming any interest by or through such Participant, the result of which shall be adverse to the Participant or any person claiming an interest by or through such Trustee of defending

or bringing such action shall be charged, to the extent possible, directly against any benefits becoming payable to such Participant or such person claiming any interest by or through such Participant. The excess, if any, shall be charged against the Trust Fund as an expense of the administration of the Trust Fund. If the result of such action is adverse to the Trustee, he shall charge such expenses against the Trust Fund as an expense of administering the Trust Fund.

- Data. Participants, former or retired Participants, beneficiaries and joint annuitants, must furnish to the Committee, the Trustee, or any Insurance Company involved in funding the benefits under the Plan, such documents, evidence, or information as the Committee, Trustee or Insurance Company consider necessary or desirable for the purpose of administering the Plan, or to protect each Company, Subsidiary, Affiliate, Trustee and Insurance Company; and it shall be a condition of the Plan that each such person must furnish such information promptly and sign such documents before any benefits become payable under the Plan. In the event of a mistake or a misstatement as to any item of such information which has an effect on the amount of benefits to be paid under the Plan, or in the event of a mistake or misstatement as to the amount of payment to be made to a Participant, a beneficiary or joint annuitant, the Committee shall withhold or accelerate, such amounts as will in its judgment accord to sucl. Participant, beneficiary or joint annuitant, the benefit to which he is properly entitled under the Plan.
- 15.7 No Individual Liability. It is declared to be the express purpose and intentice of the Plan that no liability whatever shall attach to or be incurred by the stockholders, officers or members of the Board of Directors of a Company, Subsidiary or Affiliate, the Committee or any representatives appointed hereunder, under or by reason of any of the terms or conditions of the Plan. No person shall be liable for any act or failure to act hereunder except for gross negligence or fraud.
- that a Participant has accepted employment or engaged in a business (other than a Company, Subsidiary, Affiliate, or Associated Company) having to do with paper, paper products or other products manufactured, distributed, wholesaled, converted, sold or otherwise disposed of by a Company, Subsidiary, Affiliate or Associated Company, and also shall determine that such employment requires or involves the disclosure or use of knowledge or information gained in the course of his employment with a Company, Subsidiary, Affiliate or Associated Company, the Committee shall notify such Participant in writing that his retirement benefits will be cancelled or terminated if he does not cease such employment or satisfy

the burden of establishing to the reasonable satisfaction of the Committee that the disclosure or use of such knowledge or information is not required or involved in such business. If such Participant shall not cease such employment or satisfy such burden within sixty (60) days from the date of such written notice, all retirement income (other than any retirement benefit that may be payable to him pursuant to Subsection 19.5) theretofore credited, or then payable, to him under the Plan shall be cancelled and he shall receive, in lieu thereof an amount equal to the excess, if any, of

- (a) the sum of:
  - (1) his Standard Accumulation,
  - (2) his Voluntary Deposit Accumulation, and
  - (3) his Transferred Accumulation, over
- (b) the total amount of benefits theretofore received by him under the Plan other than benefits received by him pursuant to Subsection 19.5.

## Section 16. Amendment and Termination

- Plan to be permanent, but since future conditions cannot be anticipated or foreseen it must necessarily, and hereby does, reserve the right to change the Trustee, or to modify, terminate, or discontinue the Plan as to itself at any time. The President of each Company, on behalf of such Company, may make modifications or amendments to the Plan from time to time. No part of the corpus or income of any funds shall at any time be used for or diverted to purposes other than for the exclusive benefit of Participants or their beneficiaries, and no amendment shall divest any Participant of his previously accrued interest herein, except as may be required by the Internal Revenue Service in order to qualify or maintain the Plan as an exempt plan meeting the requirements of the applicable section or sections of the Internal Revenue Code, as now in effect or hereafter amended, or the regulations or rulings issued thereunder, or except as may be required by any other governmental authority.
- 16.2 Effect of Discontinuance. If a Company, Subsidiary or Affiliate should decide to discontinue contributions to the Trust Fund, or to terminate its participation in the Plan, it shall give notice thereof to the Trustee and to the Participants affected thereby. Thereupon all Participants

Herendeen v. Champion International Corp. et al.

ENDORSEMENT 74 Civ. 828-LFM

Defendants' motion under Rule 12(e), Fed.R.

Civ.P., for a more definite statement of the claims

plaintiff attempts to assert against the defendants

is granted, and plaintiff is directed to serve and

file an amended complaint, within thirty (30) days,

correcting the defects complained of and alleging

the details desired by the defendants. Defendants'

motion is denied in all other respects without preju
dice to renewal, if counsel is so advised, following

the filing and service of an amended complaint.

So ordered.

Dated: New York, N. Y.

July 18, 1974

LLOYD F. MacMAHON

United States District Judge

JUL 19 1974

UNITED SAMAES DISTRICT COURT
FOR THE SOUTHFUN DESTRICT OF MEW YORK

INDEX NO. CIV 828-1371

JAMES W. HERENDEEN.

AMENDED COMPLAINE

Plaintiff,

PLAINTIFF DEMANDS A JURY TRIAL.

-against-

CHAMPION INTERNATIONAL CONFORMTION; NATIONATED PAPERS INCORPOTATED; and CHEMICAL EARK NEW YORK TRUST COMPANY; THE PIEST THIRD BANK, and the COMMITTED; as Administrator of the Retirement Income Plan for Salaried. Employees of Certain Subsidiaries of CHAMPION INTERNATIONAL CONFORATION,

Defendants.

plaintiff complaining of the defendants by his attorneys, RUBIN, BODROW, AGATSTON & SCHEFFLER, alleges as follows:

#### COUNT I

# AS AUD FOR A CIPSE CAUSE OF ACTION

- 1. Plaintiff is a citizen of the United States and a resident of 100 Manhattan Avenue, Union City, in the State of New Jersey.
- information and belief, the defendant, CHAMPION INTERNATIONAL COMPORATION, referred to hereinafter as "Champion", was and still is a corporation organized under the laws of the State of New

York with an office and principal place of business in the City and County of New York.

- information and belief, the defendant, MATIONAIDE PAPERS

  MEMORIPES THE Control of the defendant, MATIONAIDE PAPERS

  corporation duly authorized to do business in the State of New

  York with an office and principal place of business in the County

  of New York.
- 4. At all times hereinafter mentioned and upon information and belief, the defendant, CHEMICAL BANK NEW YORK TRUST COMPANY, hereinafter referred to as "Chemical Bank", is a New York corporation with an office and principal place of business in the County of New York and is a Trustee of the Retirement Income Plan for Salaried Employees of Certain Subsidiaries of Champion International Corporation, hereinafter referred to as the "Plan".
- mation and belief, the defendant, THE FIRST THIRD DANK, was and still is a Trustee of the Plan and a foreign corporation which administered the trust funds of the Plan located in the State of New York and which has an office and principal place of business in Cincinnati, Ohio. Said CHEMICAL BANK and THE FIRST THIRD DANK are hereinafter referred to as the "Trustees".

- mation and belief, the defendant, the COMMITTEE as Administrator of the Plan, referred to herein as the "Committee", is a group of individuals designated from time to time to act in such capacity by Champion under the terms of the Plan and who as a group carry on within the State of New York for employees of Champion employed in the State of New York the duties and obligations bestowed upon them and assumed by them under the terms of the Plan.
- 7. On or about November 1, 1954, plaintiff was employed in the State of New York by The Whitaker Paper Company ("Whitaker") and continuously thereafter was an employee of Whitaker and its successors in the State of New York, County of New York, to and until May 15, 1969.
- 8. Plaintiff's primary position with Whitaker and its successors was that of salesman of paper to the book publishing and commercial trade.
- 9. At the time of plaintiff's employment with Whitaker there was existing for the benefit of the employees of Whitaker The Whitaker Paper Company Pension Trust, established December 30, 1942, as amended.
- 10. As a result of plaintiff's employment by Whitaker, plaintiff became entitled to certain benefits under the terms and conditions of said pension trust.

- 11. Upon information and belief, on or about July 1,
  1957. Whitaker amended the aforesaid pension trust for the benefit
  of its employees, which pension trust was thereafter known as the
  Whitaker Paper Company's Employees Retirement Plan (hereinafter
  called "The Whitaker Plan").
- 12. Upon information and belief, on or about April 30, 1963, Whitaker was merged into Carpenter Paper Company, an Ohio corporation, thereafter known as Nationwide.
- 13. Upon information and belief, as a result of said merger, The Whitaker Plan was amended on or about April 29, 1963, to provide for continued benefits to the employees of Nationwide forwerly employed by Whitaker.
  - 14. Upon information and belief, Nationwide became and still is a subsidiary of Champion.
  - 15. Upon information and belief, as a result of various mergors and acquisitions, The Whitaker Plan, effective as of July 1, 1965, was merged into and became part of the Plan.
  - 16. On or about December, 1967, Champion and/or its subsidiary, Nationwide, sold the commercial paper business of Nationwide to Reinhold-Gould Inc., upon information and belief now known as Gould Paper, Inc. (hereinafter referred to as "Gould").
  - 17. Subsequent to such sale to Gould several employees, hereinafter designated, of Nationwide, holding the same or

similar positions as plaintiff and with knowledge or information gained in the course of their respective positions with Champion and/or its subsidiaries as great or in excess of any similar knowledge gained by plaintiff, terminated their employment with Nationwide and became employees of Gould and/or other competitors of Champion and/or its subsidiaries.

- 18. Subsequent to such sale to Gould, plaintiff was directed by certain officers and directors of Champion and/or Nationwide not to make any sales to commercial paper purchasers or otherwise compete with Gould for such business.
- paid on a colory basis rather than commissions as in the past and was directed to sell to the book publishing trade only.
- course of his comployment with Nationwide, plaintiff was required to and did compete for business in the book publishing field with former employees of Nationwide who became employees of Gould, to wit: among others, one Benjamin F. Brown, hereinafter referred to as "Brown".
- 21. On or about October 25 1967, in answer to a letter dated September 29, 1967, to the Benefits Administrator of Nationwide, Brown was advised by letter from John R. Parker, a copy of which is annexed hereto as Exhibit "A" and made a part

hereof, that continuance of employment by Brown with Gould would not be deemed in violation of Section 15.8 of the Plan.

- 22. On or about January 7, 1968, and while still an employee of Gould, Brown did apply for and thereafter did receive the retirement benefits due to him as set forth in Exhibit A.
- 23. Upon information and belief, the following named, additional, former employees of Nationwide in the same or similar positions as plaintiff and who thereafter became employed by Gould have applied for and did receive their respective retirement benefits under the plan:

Joseph Carpitano

Austin B. McKnight

Louis Grabow.

- 24. Upon information and belief, C. William Arvidson, also a former employee of Nationwide in the same or similar position as plaintiff did apply for and receive his retirement benefits under the Plan while an employee of Milton Paper Company, another competitor of Champion and/or its subsidiaries.
- 25. On or about May 15, 1969, plaintiff resigned from nationwide and commenced employment with Ris Paper Company, Inc., referred to hereinafter as "Ris".
- 26. The business of Ris in the paper industry is the some or similar to that of Gould and Milton Paper Company, and they compete with each other and with Mationwide for the same customers.

- 27. Any information or knowledge gained by plaintiff in his employment with Mationwide was of a general nature known by any salesman in the trade, including but not limited to the other former employees of Champion and/or its subsidiaries referred to herein, and plaintiff's employment by Ris does not require or involve on his part the disclosure or use of any knowledge or information otherwise gained in the course of his employment by Nationwide and not known or available to any other person similarly employed in the trade.
- 28. Plaintiff's employment by Ris requires of plaintiff the same or similar knowledge, if any, required of all of the other former employees of Nationwide in their subsequent employment by Gould or Milton Paper Company as aforesaid.
- 29. On or about July 11, 1969, by letter dated June 26, 1969, annexed hereto as Exhibit "B" and made a part hereof, the Committee notified plaintiff that his employment with Ris requires or involves on plaintiff's part the disclosure or use of knowledge or information gained in the course of his employment with Mationwide and that therefore plaintiff's retirement benefits under the Plan would be cancelled or terminaled, in accordance with the provisions of Section 15.8 of the Plan, if plaintiff did not couse such employment or establish to the reasonable satisfaction of the Committee that the disclosure or use of knowledge or information gained in the course of his former employment with

Nationwide is not required or involved in his present employment with Ris.

- 30. Upon information and belief, the Committee has made no similar claim with respect to the other former employees of Nationwide who left their employment and are now working for companies similar to Ris as aforesaid.
- 31. Accordingly, in response to the aforesaid notice from the Committee, the plaintiff offered by letter dated September 2, 1969, to establish to the reasonable satisfaction of the Committee that his employment with Ris does not involve the disclosure or the use of knowledge or information gained in the course of his employment with Nationwide or any other subsidiary or predecessor company.
- 32. In spite of such offer by plaintiff, the Committee willfully failed and refused to meet with plaintiff so that he could, as they requested, establish that the disclosure or use of knowledge or information gained in the course of his employment with Mationwide is not required or involved in his employment with Mis.
- plaintiff also notified the Consitte that its determination with respect to his employment by his was not consistent with respect to its determination in regard to other former employees of Champion and its subsidiaries, whose benefits under the Plan Leve not terminated under similar circumstances.

34. By letter dated February 27, 1970, ennemed hereto as Emhibit "C" and made a part hereof, from the Committee to plaintiff, the Committee rejected plaintiff's position set forth in his letter of September 2, 1969, and willfully failed and refused to meet with plaintiff before reaching such decision.

35. By letter dated May 18, 1970, from the plaintiff to the Committee, plaintiff rejected the Committee's determination.

36. By letter dated June 16, 1970, from the Committee to the plaintiff, the Committee notified plaintiff of the termination in accordance with Section 15.8 of the Plan of the plaintiff's retirement benefits otherwise available to him at his retirement date under the Plan.

37. By letter dated June 29, 1970, from the Committee to the plaintiff, the Committee forwarded to plaintiff the check of THE FIFTH THIED BANK, in the amount of \$1,099.79, as a refund of his contributions to the Plan with interest to such date.

38. By letter dated July 21, 1970, from the plaintiff to the Committee, plaintiff returned the sheek to the Committee and rejected the determination of the Committee with respect to his benefits under the Plan.

39. Under the terms of the Plan, Champion has the right to designate, change and remove the members of the Committee and the Trustees who neminister the funds of the Plan, and, as the result of such position and its additional economic position as parent of its subsidiaries named as defendants herein, Champion,

upon information and belief, is in complete control of all of the defendants herein and its subsidiaries with respect to the actions alleged to have been taken by such defendants and subsidiaries with respect to plaintiff as set forth herein.

- have willfully acted in concert, with the full knowledge of all of the facts and circumstances set forth herein and under the direction of Champion, wrongfully and in violation of the terms and conditions of the plan, to force plaintiff out of the paper industry and to withhold from him and thereby retain within the assets held by the Trustees, the monies and benefits to which plaintiff is entitled.
- 41. The Committee's aforesaid determination was erroncous and was arbitrarily and capriciously made and was made either
  without knowledge of the facts, which they willfully failed and
  refused to obtain from plaintiff, or in disregard thereof.
- 42. The Committee's aforesaid determination was in willful violation of Section 5.5 of the Plan that requires:

"In making any such determination, or enforcing any rule or regulation adopted by the Committee, the Committee shall pursue uniform policies applicable to all employees similarly situated and shall not discriminate in favor of any employee or group of employees."

43. The Committee's aforesaid determination willfully violated Section 5.5 of the Plan in view of the fact that, as herein set forth, other former employees of Mationwide, who have been subsequently employed by other companies similar to Ris,

have not, as plaintiff has, been deprived of their benefits under the Plan.

- have knowingly and willfully violated and breached
  the provisions of the Plan and their fiduciary duties as
  Trustees with respect to the funds of the Plan by complying,
  without objection, with the Consittee's wrongful concellation
  and termination of plaintiff's vested rights and interest in the
  Plan and taking action toward such end.
- 45. Upon information and belief, the Trustees have breached the terms and conditions of the Plan by agreeing to the wrongful termination of plaintiff's participation in the Plan by the Committee and by taking action in furtherance of such termination as aforesaid.
- 45. As a result of the foregoing, the plaintiff's rights and benefits under the Plan and the plaintiff's rights and benefits under a so-called Health Carc Plan, a so-called Disability Throme Plan and a so-called Death Benefit Plan, all of which are a part of the so-called Denefit Plans of Champion and its subsidiaries, of which the Plan is a part, have been prejudiced and impaired.
- 47. Plaintiff has duly performed all of the terms and conditions of the Plan on his part to be performed, except to the extent that performance has been rendered impossible by the acts and conduct of the defendants.

and wrongful violation and breach of the provisions of the Plan by the defendants, plaintiff has been damaged and will be deprived of the retirement benefits to which he is entitled as a full Participant with a vested interest in the Plan, as aforestid, having then information and belief, a present value of \$50,000., and has been deprived of the other benefits which were due to him as an employee and as a Participant in the Plan, under the Feulth Care Plan, Disability Income Plan, Death Benefit Plan and all other similar plans and benefits available to the Participants of the Plan in the additional amount, upon information and belief, of \$50,000.

#### COUNT II

#### AS AND FOR A SECOND CAUSE OF ACCION

- 49. Plaintiff repeats and reiterates each and every allegation set forth in Paragraphs 1 through 48, inclusive, hereof and makes same a part hereof with the same force and effect as if set forth at length herein.
- 50. Upon information and belief, the defendants, Champion and Nationwide, by their agents and employees, did deliberately and without cause or justification induce the defendant Committee wrongfully to terminate plaintiff's participation in the Plan, as aforesaid.

- of the defendants, and more particularly the determination by the Committee to cancel plaintiff's retirement benefits without justification and in violation of the specific terms and conditions of the plan, and the inducement by Champion and Nationwide of the Committee to take such action were calculated and intended by the said defendants acting in concert to prevent the plaintiff from engaging in the only occupation in which he has been engaged curing nost of his adult life; and, by reason of the foregoing, the plaintiff claims the right to punitive damages from the defendants.
- 52. Upon information and belief, defendants did and continue to engage in a complicity, acting under the aegis of Champion, to discriminate among Participants in the Plan having vested interests therein and, when deemed desirable to defendants, to prevent participants such as plaintiff from asserting their rights by claiming that they must either continue to work at the will of Champion or its respective subsidiaries or find a position outside the paper industry, under penalty of their participation in the Plan being "cancelled".
- 53. Upon information and belief, each Trustee has a conflict of interest in accepting in trust, as a fiduciary, its allocation by Champion of its proportion of the assets available under the Plan, but subject to the control of and by Champion, or

on its behalf, irrespective of the provisions of the Plan by which each Trustee is legally bound.

orders through the chain of command from the President of each Committee member's respective subsidiary of, and controlled by, Champion; and Mationwide and the Trustees actively and knowingly carried out the discrimination and wrongdoing against plaintiff.

55. As a result of the foregoing, plaintiff is entitled to and demands exceplary damages from all of the defendants as hereinafter set forth.

WILLEFORE, plaintiff demands judgment as follows:

- 1. In the sum of \$100,000. For the wrongful loss of the benefits due to plaintiff under the terms and conditions of the Plan, and that the Court:
- (a) Petermine that the Committee by terminating plaintiff's benefits under the Plan violated the terms and conditions of the Plan and that such action should be rescinded and of no further force and effect.
- (b). Enjoin Champion and Nationwide from interfering or otherwise influencing the determination of the Committee
  as Administrator of the Plan with respect to the benefits due to
  the plaintiff under the Plan.
- (c) Enjoin the Trustees from taking any action to carry out the termination of plaintiff's benefits under the Plan

and direct them to hold and maintain the necessary assets under the terms and conditions of the Plan for the benefit of plaintiff and to pay out to plaintiff, when and as due, the benefits to which plaintiff is entitled under the terms and conditions of the Plan.

- (d) Direct the Committee to take whatever action may be necessary to reinstate plaintiff as a participant in the plan, entitled to all of the benefits vested in him as a participant as of the termination of his employment with Mationwide on pay 15, 1676.
- (c) Enjoin and restrain Champion and Matienwide from interfering in any way with the benefits due to plaintiff under the Plan and Girect said defendants to take all action necessary to guarantee to plaintiff all of the rights and benefits which were due to him as an employee, as a participant in the Plan under the Mealth Care Plan, Disability Income Plan, Death Benefit Plan and all other similar plans and benefits available to the participants of the Plan.

#### AND that the Court:

- 2. Award exemplary damages in favor of the plaintiff and against the defendants, as follows:
  - (a) \$10,000. from Chemical Bank as a fiduciary,
  - (b) \$10,000. from The Fifth Third Bank as a fiduciary,

- (c) \$5,000. from the Committee as Administrator of the Plan,
- (d) \$10,000. from Nationwide as an active member of the complicity in trying to force plaintiff out of the paper industry, plaintiff's only occupation during his adult life,
- (e) \$750,000. from Champion as exemplary damages
  but in an amount deemed to be punitive
  in view of its financial position.

And that the Court:

3. Grant to plaintiff such other and further relief as may be proper, teacher with the costs and disbursements of this action, including a fair and reasonable amount for councel fees and other lawful expenses in connection with the prosecution of this action.

By: WALTER A. BORROW

Attorneys for Plaintiff
Office and P. O. Address:
271 North Avenue,
New Rochelle, N. Y. 10801

Tel.: (914) 632-5050.

October 25, 1967

Dr. Benjamin F. Brown III Whiteker Paper Company 50 Great Jones Street New York, New York 10012

Deer Mr. Brown:

This is in answer to your letter dated September 29 addressed to Mr. Jack Lind, Benefits Administrator, Pationwide Papers. I have the information which you requested.

Since your retirement benefits would depend upon the date of your retirement, we have used an early activement date of December 1, 1967 in computing your various options.

# Modified Cash Refund Annuity Ontion

Your normal retirement benefit would amount to \$423.86 mentily, payable to you for life and would ceuse upon your death.

# Ten Year Cortain Annuity Option

Under this option your menthly benefit would amount to \$406.05 monthly, but would guaranece no less than 120 payments for a total pay-out of \$48,727.20. If you should die prior to having received this amount, the belance would be paid by continued monthly payments to your designated beneficiary.

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Mr. Benjamin F. Brown III. October 25, 1967 Page 2

### Full Cash Refund Annuity Option :

Under this option your monthly benefit would be \$378.29, but here the full actuarial value of the annuity which amounts to \$69,322.30 would be guaranteed. If you should die prior to having received this amount, the balance would be paid to your designated beneficiary in one lump sum payment.

## Joint and Survivor Annuity Option

60	100%	\$324.42	(	324.42	to	Joint	Annuitant)
C	75%	344.63	(	258.47	1:0	Joint	Annuitant)
	50%	367.52	(	183.76	to	Joint	Annuitant)
	25%	393.70	(	98.43	to	Joint	Annuitant)

Under the Joint and Survivor Annuity Option you would receive a reduced monthly income for as long as you live, but after your death an income would be continued to your beneficiary, known as your "Joint Annuitant" for the rest of her life. The monthly income to be continued to your beneficiary after your death may be the same as the amount paid to you or you may choose a percentage of your own monthly payment such as 75%, 50% or 25%, as shown above. The amount of reduction in your retirement income under this option is determined, not only by your own age, a like time of your retirement, but also by the age of your designated beneficiary who is approximately 54 and 10/12th years of age, as at December 1, 1967, the effective date of this retirement computation.

We have enclosed copies of the Request For Retirement Benefits form in the event you should elect to take early retirement at this time. This will give us the necessary written advice of your retirement income election and indicate the manner in which you wish your monthly retirement income to be paid. The original should be returned to the Benefits Department, Nationvide Papers, Knightsbridge, Hamilton, Ohio. One copy should be retained for your file, and one copy sent to me for our record. After retirement you and Mrs. Brown would be entitled to the benefits for retirees as explained in the enclosed booklet "Champion Health Care Plan For Retirees."

Mr. Benjamin F. Brown III October 25, 1967 Page 3

Since the value of your Past and Future Service Retirement, computed at age 65, is projected to be considerably in excess of your present death benefit of \$72,200.00, there will be no continuation of any portion of this benefit after retirement.

Finally, you have asked the question as to how the limitation of benefits clause, section 15.8 of the Retirement Income Plan, will apply. Continuance of employment with Reinhold Gould would not be deemed by the benefits committee to be in violation of this section. It is not for us to grant permission for you to seek employment elsewhere in the paper business. This is your prerogative of course. The provisions of section 15.8 would govern your continued eligibility for retirement income, and the committee could make a determination under section 15.8 only upon facts and not a hypothesis. The fact of principal importance which would have to be considered by the committee would be the identity of any new employer and the nature of its business.

If you have any questions, please do not hesitate to contact me.

Sincerely, Page

John R. Parker

JRP/jaa Enclosures

militarian in the contraction of My comment June 26, 2909 per/ 11,1969 Mr. James W. Merendeen 94 Lore bill head briar Chil Manor, New York 10:10 Dear Jim: This notice is given in accordance with Section 18, 3 of The Retirement Income Plan for Salari, d Employees of Certain Sabsidiarnes of U.S. Plywood-Champion Papers Inc., which provides as follows: "15.8 Compatition. In the event the Committee shall determine that a Participant has accepted employment or engaged in a business (other than a Company, Subsidiary, Affiliate, or Associated Company) having to do with paper, paper products or other products manufactured, distributed, wholesaled, converted, sold or otherwise disposed of by a Company, Sabsidiary, Affiliate or Associated Company, and also shall netermine that such employment requires or involves the disclosure or use of knowledge or information gained in the course of his employment with a Company, Subsidiary, Affiliate or Associated Company, the Committee shall notify such Participant in writing that his retirement benefits will be cancelled or terminated if he does not coase such employment or satisfy the burden of establishing to the reasonable satisfaction of the Commutes that the disclosure or use of such knowledge or information is not required or involved in such business. If such Participant shall not cease such employment or satisfy such burden within sixty (60) days from the date of such written notice, all retire. ment income..... theretefore credited, or then payable, to him under the Plan shall be cancelled and he shall receive, in lieu thereof an amount equal to the excess, if any, of (a) the sum off (2) Mis Scandard Accumulation (2) his Voluntary Deposit Accumulation, and (3) his Translative Acquirelesion, over (a) the court amount of penellin transferrors received by him under the Plan. . . . ". The Commence has constant of that you is we have, on employment with its Paper the game, and, in virgito do aira paper, paper produces, or other products manumeture of all armounds, when thereof, converted, and her etherwise diagonal of by i i simili de la parte, ambor moneral a ni centre a color que il milità d'un estre an pioprate all regulars or hardress on year proceeds a commence of a continuence type or internation per en un con contra qu' pour employment mui ver en viere impera incorparatesi. 102a

V.B.Ph. WOOD-CHARLEN PARTY TRO.

Page 2 June 26, 1969 To: James W. Herendeen

referred to herein will be cancelled or terminated if you do not cease such employment or establish to the reasonable satisfaction of the Committee that the disclosure or use of knowledge or information gained in the course of your former employment with Nationwide Papers Incorporated is not required or involved in your present employment with Ris Paper Company, Inc.

Your normal retirement benefit at age 65 on a modified cash refund annuity basis would be \$527.90, provided that you leave your retirement deposits in the Plan. You retirement deposits total \$1,007.19. If you withdraw your retirement deposits you would receive this amount, plus interest, and your monthly benefit at age 65 would be reduced by \$156.37, leaving a balance of \$371.53 payable monthly at age 65.

These options are contingent upon your compliance with the provisions of the above quoted Section 15.8. If you do not comply with these provisions, your retirement deposits, plus interest, will be refunded to you and all retirement benefits will be cancelled.

Enclosed is a copy of the "Retirement Income Plan for Salaried Employees of Certain Subsidiaries of Champion Papers Inc." which was adopted as of July 1, 1965 and also a copy of the predesessor Plan "The Whitaker Paper Company Employee's Retirement Plan" requested in your letter to Mr. Lawless of June 13, 1969.

It is essential that we receive your reply within 60 days from receipt of this letter. Failure to do so will result in our final notice to you that your vasted entitlement has been forfeited.

Very truly yours,

The Committee, Retirement Income Plan for Salaried Employees of Certain Subsidiaries of U.S. Plywood-Champion Papers Inc.

Charke Admins, Chairman

REGISTERED MAIL
RESTORN RECEIPT REQUESTED



# Champion Papero · Kmightebridge · Hamiliton, Ohio 46011

February 27, 1970

Mr. James W. Herendeen 94 Long Hill Road Brian Cliff Manor, New York 10510

Dear Jim:

This response to your letter of September 2, 1969 has been considerably delayed for which we apologize. Please be assured that the time for decling with this matter is extended sixty days from this date, so that you will not be adversely affected by our delay. (See Section 15.8 of the Retirement Income Plan for Salaried Employees).

The Committee has considered your statement and has also requested and obtained a statement of the position of the management of Nationwide Papers Incorporated with regard to knowledge and information gained in the course of your employment with Nationwide and Whitaker Paper Company. It appears that due to changes in technology, such as development of the web offset printing process, the use of pre-sheeters, development of trailing blade and air baife coaters and changes in grade manufacturing and manufacturers, together with customer changes brought about by mergers, acquisitions and changing purchasing policies and personnel in the book publishing field, over the last fifteen years, the knowledge and information gained by you in the course of your employment with Whitaker and Nationwide would necessarily be involved in your present work.

Therefore, the Committee must conclude that you have not shown that you have not shown that you present companyment does not require or involve disclosure or use of knowledge or information gained in the course of your completion with lintionwide Report Lacorpovated and Whitehar.

Paper Company.



Mr. James W. Herendeen February 27, 1970 Page 2

If you wish to present any additional thoughts or proof of your position, a case be assured that they will receive every reasonable consideration by the Committee.

Very truly yours,

Champion Employee Benefits Administration Committee

By Clarke Adams

Reinhold-Gould, Inc. 230 Park Avenue New York, New York 19017

Attention: Mr. Harry E. Gould, Sr.

#### Gertlemen:

We are pleased to confirm our understanding that Nationwide Papers Incorporated (hereinafter referred to as NPI) will sell to Reinhold-Gould, Inc. (hereinafter referred to as Reinhold-Gould), and Reinhold-Gould will purchase from NPI, the commercial printing paper segment of the Whitaker-New York Division of NPI, consisting of the inventory, the accounts receivable and any notes receivable pertaining to this segment of its business on the terms and conditions hereinafter stated:

- 1. It is intended and agreed that Reinhold-Gould shall take over the commercial printing paper business of the Whitaker-New York Division of NPI, and NPI will give its best efforts to effect an orderly transfer of such business and retention of present suppliers and customers; provided, however, that Reinhold-Gould shall not be obligated to continue operating the Whitaker-New York commercial printing paper business for any period of time.
- 2. To facilitate its continuation of the publishing products business, NPI will retain in its service Messrs. Lawless, English, Herendeen and Kavanaugh, together with two clerical and secretarial employees associated with the publishing products segment of the business of NPI.
- 3. To the full extent desired by Reinhold-Gould, NPI shall give its best efforts to assure that all personnel involved in the commercial printing paper segment of the business of Whitaker-New York (apart from the personnel referred to in paragraph 2 above) shall remain with the commercial printing paper business purchased by Reinhold-Gould. It is understood that we will both use our best efforts to assure their continued employment by Reinhold-Gould, provided, however, that Reinhold-Gould shall have no obligation to continue the employment of any particular employee for any period.

- 4. The commercial printing paper inventory of Whitaker-New York amounted to approximately \$251,000 at the beginning of 1967. Such inventory on hand as of the transfer date (as defined in paragraph 8 below) shall be purchased by Reinhold-Gould for a sum equal to its landed cost, book value (determined in accordance with Exhibit A attached), or market value, whichever is lower. It is agreed that, for the purpose of verifying the stock of commercial printing paper on hand at Whitaker-New York as of the transfer date, the physical inventory as of September 30, 1967, shall be adjusted as of the transfer date, or, if requested by Reinhold-Gould, a new physical inventory shall be taken jointly as of the transfer date with the cost of taking such inventory to be shared equally by the parties hereto. A copy of the inventory and the valuation thereof based on landed cost, book value or market value, whichever is lower, showing our mutual agreement thereto, shall be attached hereto as Exhibit B and thereupon become a part of this agreement.
  - amount of the accounts receivable and any notes receivable pertaining to commercial printing sales by the Whitaker-New York Division of NPI. The total agreed-upon valuation of the inventory, plus the aggregate amount of accounts receivable and any notes receivable, shall constitute the purchase price to be paid by Reinhold-Gould to NPI as provided in paragraph 7, below.
  - 6. A copy of the list of accounts receivable and any notes receivable showing the amounts thereof shall, after agreement thereto between the parties, be attached hereto as Exhibit C and become a part of this agreement. Any payment received from any debtor listed in Exhibit C, for sales made by the Whitaker-New York Division of NPI to such debtor shall be applied by Reinhold-Gould to the account receivable for such debtor, transferred hereunder, until such account is paid in full. It is understood and agreed that Reinhold-Gould will attempt to collect in the usual course of business all accounts and notes receivable assigned to it hereunder, without any obligation, however, to bring or threaten any suit or proceedings for the collection of such accounts and notes. It is further understood and agreed that any accounts receivable not collected as provided herein within 90 days following the transfer date, after such 90-day period, and any note receivable not paid upon its maturity date, may be turned back to NPI at the option of Reinhold-Gould; provided, however, that no such account or note receivable may be turned back to NPI subsequent to the date when the first installment of the purchase price as provided in paragraph 7, below, shall be payable to NPI, except any notes which have a maturity date subsequent to such date which may be turned tack to NPI at the option of Reinhold-Gould within 30 days after their respective

maturity dates. The aggregate amount of the balance due on such uncollectible accounts and unpaid notes receivable turned back by Reinhold-Gould to NPI pursuant to this paragraph shall, if turned back prior to the date when the first installment of the purchase price is due, be applied to reduce the purchase price payable hereunder; and the aggregate amount of any unpaid notes receivable turned back subsequent to that date shall be applied to reduce the amount of the next installment of the purchase price that shall become due.

- 7. The first installment of the purchase price shall be payable within 30 days after the expiration of 12 months following the transfer date and shall be one fifth (1/5) of the amount constituting the purchase price to be determined in the manner set forth in paragraph 5, less any adjustment pursuant to paragraph 6. Within 30 days after the expiration of each of the next four succeeding 12 months' periods, Reinhold-Gould shall pay to NPI an amount equivalent to the installment determined at the end of the first 12 months' period, less any adjustments pursuant to paragraph 6, above, until the purchase price is paid in full.
- 8. The transfer date for the purpose of this agreement shall be
  December 31, 1967. The determination of the value of the inventory to
  be transferred and the aggregate amount of accounts receivable and notes
  receivable to be transferred shall be made as of the close of business on
  December 31, 1967.
  - 9. Reinhold-Gould shall have the privilege of occupying the premises at 50 Great Jones Street, New York, New York, now occupied by the Whitaker-New York Division of NPI, on a month-to-month basis and shall be obligated to pay rent therefor at the beginning of each month of occupancy in the amount of \$980, all in accordance with separate lease agreement, dated as of December 31, 1967. All furniture, fixtures, machinery, equipment and vehicles now in use at such premises and more fully described in Exhibit D, attached hereto, shall remain with the premises for use by Reinhold-Gould, and shall be maintained and returned by Reinhold-Gould in condition similar to the condition in which received by Reinhold-Gould, reasonable wear and tear excepted. Not earlier than one year after the transfer date, NPI shall be free to require Reinhold-Gould to vacate such premises upon not less than six months written notice. At any time Reinhold-Gould shall have the right to vacate such premises upon 30 days written notice. At such time as Reinheld-Gould shall be obligated or elects to return possession of such furniture, machinery, equipment and vehicles to NPI (coincident with vacating the premises), Reinhold-Gould shall have and may exercise, upon 30 days written

notice to NPI, an option to purchase all or any portions of such items at the book value thereof on NPI's books at such times.

- 10. NPI represents and warrants to Reinhold-Gould as follows:
- (a) NPI is a corporation duly organized, existing and in good standing under the laws of the State of Ohio;
- (b) The inventory being transferred under and pursuant to this agreement by NPI is merchantable, except where written down in accordance with paragraph 4, above;
- (c) NPI owns all the assists to be transferred pursuant to this agreement free and clear of any liens or encumbrances and has the right to transfer the same;
- (d) NPI owns the premises referred to in paragraph 9, above, and the property referred to therein, free and clear of any liens or encumbrances and has the right to permit use of the same as set out in paragraph 9;
- (e) NPI owns the name of Whitaker Paper Company and the Whitaker Paper Company logo, a copy of which appears on Exhibit E, attached hereto, and has the right to transfer said name and logo or the use thereof, and will execute any documents reasonably required by Reinhold-Gould to enable Reinhold-Gould to use such name, or a variation thereof, and the logo without variation or alteration, in the market and for the period set forth in paragraph 12 below; and that NPI owns the trade-mark, Signal, and has the right to license it for use as to Bond, Mimeo, and Duplicator papers in the market now being served by the Whitaker-New York Division of NPI, and also owns the trade-mark, Great Jones, and has the right to license it for use as to Offset paper in such market; and
- (f) The assets to be sold by NPI to Reinhold-Gould covered by this agreement do not constitute all or substantially all of the assets of NPI and, therefore, compliance with section 909 of the Business Corporation Law of the State of New York (or with comparable provisions of the law of the State of Ohio, section 1701. 76 of the Ohio Revised Code) is not required; and

1

- (g) The Board of Directors of NPI has duly authorized the execution and delivery of this agreement and the sale contemplated hereby, and NPI will deliver to Reinhold-Gould promptly after execution of this agreement a true and complete copy, certified by its Secretary, of the resolutions adopted by the Board of Directors authorizing such execution, delivery and sale.
  - 11. Reinhold-Gould represents and warrants to NPI as follows:
- (a) Reinhold-Gould is a corporation duly organized, existing and in good standing under the laws of the State of New York; and
- (b) The Board of Directors of Reinhold-Gould has duly authorized the execution and delivery of this agreement, and the purchase contemplated hereby, and Reinhold-Gould will deliver to NPI promptly after the execution of this agreement a true and complete copy, certified by its Secretary, of the resolutions of its Board of Directors authorizing such execution and delivery and purchase.
- 12. NPI hereby authorizes and licenses Reinhold-Gould exclusively to use the name of Whitaker Paper Company as a trade name to conduct a commercial printing paper business serving the same market which has been served by the Whitaker-New York Division of NPI, and also authorizes and licenses Reinhold-Gould exclusively to use the Whitaker Paper Company logo appearing on Exhibit E, attached hereto, in conducting such business in such market, for a period of three years from the transfer date, and NPI agrees not to use, or to license any other person to use, such name or logo to serve such market for such period; and NPI hereby authorizes and licenses Reinhold-Gould exclusively to use the trade-mark, Signal, for Bond, Mimeo, and Duplicator papers in conducting a commercial printing paper business serving the same market which has been served by the Whitaker-New York Division of NPI; and authorizes and licenses Reinhold-Gould, on a non-exclusive basis, to use the trade-mark, Great Jones, for Offset papers in conducting such business in such market. - The license as to each of the named trade-marks is for a period of three years only; provided, that Bond, Mimeo, and Duplicator papers sold under the Signal trade-mark and Offset paper sold under the Great Jones trade-mark shall be equal or superior in quality to the specimen of each such category of paper exemplified by Exhibits F, G, H, or I, respectively, attached hereto and; provided, further, that,

in the event Reinhold-Gould shall sell paper under either trade-mark which is inferior in quality to such prescribed quality, NPI may cancel both of the trade-mark licenses.

- 13. Reinhold-Gould shall have the right to retain all original records of the commercial printing paper segment of the Whitaker-New York Division of NPI pertaining to inventory, sales, payroll and credit matters. NPI shall have the right to make copies thereof as it deems necessary. NPI and Relahold-Gould mutually agree to furnish each other all additional information reasonably requested by the other party.
- 14. It is expressly understood and agreed that Reinhold-Gould assumes no liabilities of NPI or its Whitaker-New York Division in connection with this transaction.
- 15. Any and all New York State or New York City sales tax liability resulting from this agreement or the completion of the transactions contemplated hereby shall be borne by NPI, and NPI agrees to indemnify and hold harmless Reinhold-Gould against any such sales tax liability.
- 16. Each of the parties represents and warrants that such party has not retained any person as a finder or broker or in a similar capacity in connection with the transactions contemplated by this agreement and each of the parties agrees to indemnify and hold harmless the other against any claim by any such person for compensation.
- 17. The parties agree that NPI shall not be required to comply with any notice to creditor requirements of any applicable bulk sales law or similar statute; provided, however, (1) that NPI shall indemnify and hold harmless Reinhold-Gould against any claims of creditors which may be asserted against Reinhold-Gould by virtue of the transactions contemplated hereby; and (2) that Reinhold-Gould shall promptly notify NPI of any such claim and NPI shall promptly undertake settlement or defense of such claim.
- . 18. This agreement shall be governed by and construed in accordance with the laws of the State of New York applicable to contracts made and to be performed wholly within said State.

- 19. This agreement embodies the entire agreement between the parties and there have been and are no agreements, representations or warranties, oral or written, between the parties other than those set forth or provided for in this agreement. This agreement may not be modified or changed, in whole or in part, except by supplemental agreement signed by the parties.
- 20. Any notices or other communications hereunder shall be in writing and shall be deemed to have been duly given if delivered or mailed first class, postage prepaid, addressed as follows:

If to Reinhold-Gould:

Mr. Harry E. Gould, Sr. Reinhold-Gould, Inc. 230 Park Avenue New York, New York 10017

If to NPI:

James S. Benton
Nationwide Papers Incorporated
One East Wacker Drive
Chicago, Illinois 60601

- 21. This agreement and all of its provisions shall inure to, and be binding upon the parties hereto and their respective legal representatives, successors, and assigns in all respects, except that it may not be assigned by either party without the prior written consent of the other.
- 22. This agreement may be executed in several counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

Reinhold-Gould, Inc.

If the foregoing is agreeable to you, will you kindly confirm the understanding set forth above by signing and returning the enclosed copy of this letter, whereupon the same shall be deemed an agreement between is.

Very or ly yours,

NATIONWIDE PAPERS INCORPORATED

By Jours D. Kinsin

Agreed for

REINHOLD-GOULD, INC.

By Malloced Chairman

Dated as of December 31, 1967

JAMES W. HERENDEEN,

Plaintiff,

AFFIDAVIT IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

-against-

74 Civ. 828 (Judge MacMahon)

CHAMPION INTERNATIONAL PROPORATION;
NATIONWIDE PAPERS INCORPORATED; and
CHEMICAL BANK NEW YORK TRUST COMPANY;
THE FIFTH THIRD BANK, and the
COMMITTEE, as Administrator of the
Retirement Plan for Salaried Employees
of Certain Subsidiaries of CHAMPION
INTERNATIONAL CORPORATION,

Defendants.

x

STATE OF NEW YORK )
COUNTY OF NEW YORK)

88.:

JAMES W. HERENDEEN, being duly sworn, deposes and mays:

- I make this Affidavit in opposition to defendants' motion to dismiss my amended complaint against them. (Annexed as Exhibit "F" to the affidavit of Jean Lucas, sworn to September 20, 1974, submitted in support of defendants' motion herein. All further references herein to "Exhibits" are the exhibit, annexed to such affidavit.)
- 2. As alleged in my said amended complaint, I am attempting by this law suit to recover the vested benefits due to me after fifteen years as an employee and participant in what is now known as the "Retirement Income Plan for Salaried Employees of Certain Subsidiaries of Champion International Corporation" (the "Plan").

- 3. The defendants in their latest motion papers

  (affidavit of Jean Lucas, paragraph 2, page 2) again describe

  my action as "the latest foray by plaintiff \* \* \* into litigation

  against Champion International Corporation and any of its sub
  sidiaries, officers, employees and associates that Mr. Herendeen

  can entrap by his conclusory and often unbelievable allegations".
- 4. As I have stated to this Court before, the truth of the matter is that having been naive enough to rely on the word of my former employer, the defendant, Champion International Corporation ("Champion"), which had grown during the course of my employment, through mergers and acquisitions, to be one of the giants of the paper industry, if not the industrial world, I find that I am the one who is "entrapped" by legal maneuvers -first, in the State Court, to deprive me of the benefits that were promised to me, and now to attempt to deprive me of the benefits which were vested in me at the time I left their employ. The defendants' main purposes seem to be to deprive me of my day in court where I can prove the allegations in my amended complaint with evidence to sustain the facts alleged therein and at all costs to prevent the defendants from having to explain their motives for having taken this unwarranted, unjustified and illegal action against me.
- 5. My first response to the actions of Champion was to try and recover the damages I sustained as the result of oral promises made to me by officers and representatives of Champion, whom I trusted. This was the basis of my complaint annexed to defendants' motion papers as Exhibit A. The State Court held,

115a

defendants' motion papers as Exhibit B, that the oral promises made to me were legally unenforceable. The "crusade up and down the Courts of New York State", referred to in Mr. Lucas' said affidavit, was merely the normal process of appeals made to the higher courts of the State of New York from that decision. The description of such appeals as a "crusade" is typical of the exaggerations used by the defendants throughout their motion papers which I believe have been submitted to influence this Court more on the basis of their physical weight than on the weight of their arguments.

- promises made to me, I now feel that I am at least entitled to recover the vested benefits that I earned during the course of my fifteen years of employment. The provisions of the Plan relied upon by defendants to deprive me of my benefits not only have not been uniformly applied, as required by the terms of the Plan and as I have alleged and illustrated in my complaint, but would deprive the Plan of its tax-exempt status under the new Pension Plan Reform Act and therefore should be strictly construed.
- 7. The defendants rely heavily upon the language of the Plan. According to the interpretation of the Plan by the defendants, I would not be entitled to any relief nor to a day in court, with respect to the companies, the Committee and the Trustees, no matter what action they took individually or in concert, and no matter what reasons they had to do so, to

deprive me of my rights under the Plan. I do not believe that the language of the Plan, to which they refer, can or should be interpreted in such manner. Moreover, in each instance there is an exception with respect to gross negligence and fraud, and I believe that the actions of Champion, the Committee and the Trustees, who knowlingly and wrongfully deprived me of my vested benefits under the Plan, as alleged in my complaint (paragraphs 53 and 54, on page 12, Exhibit "F"), constitute both gross negligence and fraud (Section 15.7 of the Plan, Exhibit "C").

8. With respect to the exact language of the Plan, the defendants also fail to bring to the Court's attention the provisions of Section 15.3 of the Plan (Exhibit "C" at page 20). This Section specifically provides as follows: "The Plan and all rights hereunder shall be governed, construed and administered in accordance with the laws of the State of Ohio." As my counsel shall show to the Court in their memorandum of law to be submitted herewith, under the laws of the State of Ohio it is quite clear that even if it be determined at the trial of this action that the defendants have not violated Section 5.5. of the Plan, as I have alleged in Paragraph 42 of my complaint (Exhibit "F", page 9), Section 15.8 of the Plan (Exhibit "C" at page 21) upon which the defendants rely to deny me such rights is unenforceable under Ohio law; and again my counsel will provide the Court with adequate legal citations to substantiate this position.

4.0

- parties—defendants since they are respectively the nominal directors and custodians of the funds which I have alleged belong to me. Their existence in such capacity is controlled by Champion pursuant to the very provisions of the Plan (Exhibit "C", Sections 2.1(e) and (h), at page 2). The Committee consists of the person or persons appointed by the president of the companies to administer the Plan; and the Trustee means one or more corporations, persons, banks or trust companies, etc., designated by the companies to hold the trust fund. In each instance it is the companies, meaning the parent Champion and its subsidiaries, that have complete control of making the determination of who shall comprise the Committee and who shall be the Trustee.
- in paragraphs 53 and 54 of my complaint, were made with full knowledge that such actions violated the terms of the Plan and therefore were so grossly in violation of the provisions of the Plan and in wanton disregard of my rights under the Plan that it is inconceivable to me that the diffendants as fiduciaries with respect to the funds of the Plan should not be held responsible to me for punitive damages as the result of such actions.
- of this Court, dated July 18, 1974, (Exhibit "E") directing me to serve and file an amended complaint: "correcting the defects complained of and alleging the details desired by the defendants".

- by the defendants as stated in their original motion papers (affidavit of Jerry L. Brammer, assistant secretary of Champion, sworn to May 23, 1974, submitted in support of defendants' motion to dismiss plaintiff's original complaint herein) was that the other employees who I had alleged were not deprived of their benefits as I was were "unspecified" and "no specifics are given with respect to the alleged discrimination", and there wasn't an allegation that the other employees were similarly situated.
- names and giving facts in the amended complaint, which substantiate these allegations, defendants again attempt to deny me my day in Court to prove these facts and allegations. They ask the Court by their renewed motion not to believe me but to believe yet another assistant secretary of Champion, Mr. Lucas, whose statement the Court is told to accept as "incontrovertible" fact without the benefit of cross examination at trial.
- argument, defendants have injected into the Plan a right of the Committee to treat anyone who leaves the Company "involuntarily" differently from those who leave "voluntarily". Even if there were such a right, and nowhere have they demonstrated that such a right exists under the terms of the Plan, the facts as I know them definitely confirm that their labels of "voluntarily" and "involuntarily" have no meaning. I no more left voluntarily as opposed to the people named in my amended complaint than it

can be said that they left "voluntarily", since had they not done as they were told they would have found themselves in the same position as I found myself. This only emphasizes the need for a trial of the real issues raised by the amended complaint and that is whether after such other employees left they no longer came within the specific language of Section 15.8 of the plan which the defendants seek to enforce against me.

- and prove at the trial if necessary that the former employees whom I have named in my amended complaint continued to compete with me for paper business after they left Nationwide and went to Gould and I remained with Nationwide; and they were and still are competing against Champion and its subsidiaries for such business to the same extent that I am now competing with Champion and its subsidiaries.
- 16. According to Mr. Lucas (Lucas affidavit, para.25),

  \* \* \* \* the Committee determined that invoking Section 15.8

  against these four employees would have been inappropriate and,
  indeed, contrary to the underlying purpose of Section 15.8."

  There is no provision in the Plan giving them the right to make such a determination.
- in Section 15.8 that a participant of the Plan must have the opportunity to " \* \* \* satisfy the burden of establishing to the reasonable satisfaction of the Committee that the disclosure or use of such knowledge or information is not required or involved in such business". Annexed hereto and made a part

hereof are copies of my correspondence with Mr. Thomas N. Kindness and Mr. Clark Adams (letters dated May 18, 1970, October 12, 1970, October 29, 1970, and March 26, 1971) setting forth the lengths.

I went to to be given such an opportunity which to this date has been denied to me.

made without the benefit of the information they requested and I offered to supply in said letters, and yet in their notice of motion to this Court defendants state: "Accordingly, plaintiff has failed to demonstrate that the Committee, or any defendant, has violated its contractual obligation under the Plan \* \* ".

"Like the original complaint, it fails to disclose the motive for the alleged conspiracy to drive plaintiff out of the pap".

business." The last motion was brought because I failed to disclose the names of the other employees, which I have now done.

Now they want the "motives" of the defendants. What prompted the members of the corporate hierarchy to take such action I can only surmise. It is not "why" they did what they did that counts but the fact that they conspired to and did do something contrary to the express provisions of the Plan. It may have been a question of personalities or finances, or that I should have been grateful to continue in their employ without the assurances of a written contract on which I could rely and which they promised me.

Whatever motives they had, they did not have the right to

deprive me of my vested benefits, except according to and in compliance with the express provisions of the Plan. This they have not done.

- I have alleged are "ludicrous", but their unfounded conclusions as set forth in their motion papers and affidavit of Mr. Lucas are "indisputable" and "incontrovertible". There seems to be one indisputable and incontrovertible fact to be derived from the defendants' myriad of motion papers herein and that is that there are disputable questions of fact that should be resolved at the trial of this action and cannot be decided by a mere affidavit of an assistant secretary.
- 21. I therefore respectfully urge the Court to deny the defendants' motions in all respects and in addition to grant plaintiff summary judgment in both counts upon the grounds that the defendants by their motion papers have admitted the illegal acts complained of in the complaint.

JAMES W. HERENDEEN

Sworn to before me this day of October, 1974.

Notary Public, State of New York
No. 60-5352050
Qualified in Westchester County of
Commission Expires March 30, 19......

May 18th, 1970

rr. Clarke Adams, Chairman
The Commistee, Retirement Income
plan for Salaried Employees of
Contain Subsidiaries of
U.S. Plywood-Champion Papers, Inc.
Knightsbridge, Hamilton, Ohio 45811

#### Dear Clurke:

Your letter of Pobruary 27th, 1970 was considerably delayed in activery. Since it was not registered. I support it was snarled in the rosuman's strike. At any rate, the accumulative delay in resolving the matter of Benefits due ma from Rationwide, in no way discurbs me at this time.

I note with good humor your second paragraph and suspect the Canditian unofficially reacted similarly to the position of the management of Nationwide Papers, Encouperated. My ability to rail of and themse comprehend the nature of this public knowledge, [i.e. changes in technology] atc. was in no way instilled in my me by actionwide. After all, I was advested and then experienced in the paper business prior to amployment by Mationwide. Indeed, these three expentially the attitudes I was hired for. Further, I note subjet that Mationwide in no way contributed to my physical equalma permitting me to survive through and thereby experience the changes that occurred over the years in the Graphic Arts. Indeed, I believe just the opposit to be true and that my stamina enabled me to survive in spite of Nationwide management.

I have been advised by consul to bring suit against Nationwide Lapers, Inc., and thereby protect by Denefit Rights accumulated Caring my fifteen years of loyal service to Whiteher Paper Company, Inc. and Dationwide Papers, Inc., (I hast add, without conflict of incorest on my part, but in the face of same by my immediate management). Moreover, I understand similar litigation is now in process and Defeel another suit would not only be expensive to all compensed, but would bring with it additional adverse publicity to the over-all corporate structure. Although a small stock holder, it is an investment I do not want to peopardize.

Page 2- Continued

I shall await the outcome of current litigation and hope that in the montine the Committee will recognize established precodence and the over-wholming justice of my claim. Their reversal of judgment, as set forth in your letter, would be most welcome.

Very truly yours,

RIS PAFER COMPANY, I.C.

James W. Herendson

J.M:dl



# Champion Payers · Knightsbridge · Hamilton, Ohio 45011

October 12, 1970

Mr. James W. Herendeen 94 Long Hill Road Briar Cliff Manor, New York 10510

Dear Mr. Herendeen:

I was not able to call back in time to meet your schedule on Friday, October 9th, and thought it best to write to you, in view of the Monday holiday schedule there.

It has been suggested that your questions and statement of your position really should be submitted to the Committee. Would it be agreeable with you to take this step? The Committee will certainly consider any information or statements you wish to submit.

Then it may or may not be necessary or indicated for us to get together for discussions, as you have recently requested.

Very, truly yours,

Thomas N. Kindness Legal Department

TNK/nc

cc: L. C. Nelson

October 29, 1970

Mr. Thomas N. Mindness U. S. Plywood-Champion Papers Inc. Champion Papers-Enightsbridge Mamilton, Chio 45011

Dear Mr. Kindness:

I regret the decision not to discuss the over-all issues with me, at least at this time.

As to the portion involving my benefits program, I am agreeable to meeting with the Benefits Committee as requested in your letter of October 12th. Presumably the headquarters of U.S. Plywood-Champion Papers Inc. in New York would be a suitable place, and I will make myself available at the earliest convenience of the Committee.

Please let me know when the meeting may occur.

Very truly yours,

James W. Kerendeen

cc: Mr. L. Clair Nelson Vice President-Logal Affairs 777 Third Ayonue, New York, N.Y. James W. Herendeen 94 Long Hill Road Briarcliff manor, N.Y. 10510

March 26, 1971

Mr. Thomas N. Kindness
U.S. Plywood - Champion Papers Inc.
Champion Papers - Knightsbridge
Hamilton, Ohio 45011

Dear Mr. Kindness:

I have been patiently waiting for a reply from you to my letter dated October 29, 1970. In the event my letter was lost, or misplaced, enclosed herewith is a copy.

Very truly yours,

Sames W. Herendeen

cc: Mr. L. Clair Nelson vice President - legal Affairs 777 Third Avenue, new York, m.Y.

GONSING DEC 3

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

-against-

JAMES W. HERENDEEN,

74 Civ. 828-LFM

Plaintiff,

Plaintill,

MEMORANDUM

CHAMPION INTERNATIONAL CORPORATION et al.,

Defendants.

#41656

MacMAHON, District Judge.

This is a motion, pursuant to Rule 12(b)(6),
Fed.R.Civ.P., to dismiss the amended complaint for failure to state a claim upon which relief can be granted.
We hold that this action is barred by the doctrine of residudicate and, therefore, find it unnecessary to consider other arguments for dismissal raised by defendants.

The instant action is the second brought by plaintiff alleging substantially the same set of facts. The first action, commenced in Supreme Court, New York County, alleged that certain defendants conspired to drive plaintiff from his employment with Nationwide Papers Incorporated (Nationwide), a subsidiary of Champion Papers,

Inc. (Champion), prevent him from engaging in the commercial paper industry, and deprive him of his benefits under the Retirement Income Plan of Champion. On November 20, 1972, Justice Markowitz dismissed the complaint on the ground that it failed to allege an enforceable cause of action.

plaintiff then commenced the present action against Champion and Nationwide, both defendants in the earlier action, and Chemical Bank New York Trust Company, Fifth Third Bank and the Committee of the Retirement Income Plan of Champion. All of the defendants here, other than Champion and Nationwide, are agents of Champion and Nationwide and therefore in privity with them.

A comparative study of the state court com
plaint and the present amended complaint shows that

the claims asserted here are virtually identical to

some of the claims contained in the state court com
plaint dismissed by Justice Markowitz for insufficiency.

The amended complaint in the present action alleges

that defendants acted wrongfully and in violation of

the terms and conditions of the Retirement Plan to force

plaintiff out of the commercial paper industry and to deprive him of his benefits under the Retirement Plan. The amended complaint here, therefore, contains identical claims against the same parties or those in privity with them as those contained in the state court complaint.

The doctrine of res judicata operates as a bar to subsequent suits involving the same parties or those in privity with them based on claims that have once reached judgment on the merits. All defendants here, therefore, can invoke the defense of res judicata since the dismissal of the state court complaint forecloses this action against all defendants. "A dismissal for failure to state a cause of action is a final judgment on the merits sufficient to raise the defense of res judicata in a subsequent action between the parties."

Accordingly, defendants' motion under Rule
12(b)(6) to dismiss the amended complaint for failure
to state a claim is granted. SO ORDERED.

Dated: New York, N. Y.

December 30, 1974

LLOYD F. MacMAHON

United States District Judge

2

## FOOTNOTES

See decision in Herendeen v. U.S. Plywood-Champion Papers, Inc. (Sup. Ct. N.Y. Co., Nov. 20, 1972), reported in New York Law Journal, Jan. 11, 1973.

Although defendants Chemical Bank New York Trust Company and Fifth Third Bank are called "trustees" of the Plan, it is clear that they do not meet the minimum requirements needed to qualify as legal trustees. The following terms of the Retirement Plan show that these banks are agents of the corporations: (1) The banks hold the money of the fund and release it to individuals designated by the Committee of the Retirement Plan. (2) The banks have no duties or discretion in administering the Plan and can be replaced by the companies at any time.

The Committee is the agent and appointed by the companies to administer the Plan and is subject to their control.

Mathews v. New York Racing Ass'n, 193 F. Supp. 293 (S.D.N.Y. 1961).

The original complaint in the present action was dismissed by this court in a memorandum decision dated July 18, 1974 because it did not allege enough detail.

Lawlor v. National Screen Service, 349 U.S. 322, 326 (1955); Mathews v. New York Racing Ass'n, supra, 193 F. Supp. at 294.

Glick v. Ballentine Produce Inc., 397 F.2d 590, 593 (8th Cir. 1968).

### - against -

CHAMPION INTERNATIONAL CORPORATION;
NATIONWIDE PAPERS INCORPORATED; and
CHEMICAL BANK NEW YORK TRUST COMPANY;
THE FIFTH THIRD BANK, and the
COMMITTEE, as Administrator of the
Retirement Plan for Salaried Employees
of Certain Subsidiaries of CHAMPION
INTERNATIONAL CORPORATION,

Defendants.

### JUDGMENT

74 Civ. 828 (Judge MacMahon)



This cause came on to be heard on defendants' motion to dismiss the amended complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure on the ground that it fails to state a claim upon which relief can be granted, and the Court having granted said motion holding that this action is barred for the reasons set forth in its Memorandum, dated December 30, 1974, it is hereby

missed on the merits as against all defendants, to wit, Champion International Corporation, Nationwide Papers Incorporated, and Chemical Bank New York Trust Company, the Fifth Third Bank, and the Committee, as Administrator of the Retirement Plan for Salaried Employees of Certain Subsidiaries of Champion International Corporation, for failure to state a claim upon which relief can be granted; that plaintiff take nothing as against said defendants; and that defendants recover their costs.

Pated: New York, New York January , 1975

Ingle & The Walut

INGMENT ENTERED-/-22-

Attorney
GILBERT J. STROMING, II

Addres 118 WASHINGTON STREET, MORRISTOWN, NEW JERSEY 07960

PLAINTIFF-APPELLANT

JAMES W. HERENDEEN,

Plaintiff-Appellant,

-against-

CHAMPION INTERNATIONAL CORPORATION;
NATIONWIDE PAPERS INCORPORATED; and
CHEMICAL BANK OF NEW, YORK TRUST CO;
THE FIFTH THIRD BANK, and the COMMITTEE, as Administrator of the Retirement Plan for Salaried Employees
of Certain Subsidiaries of CHAMPION
INTERNATIONAL CORPORATION,

Defendant-Appellees.

: UNITED STATES COURT Court
: OF APPEALS - 2nd CIRCUIT Division

Docket # 75-7083

On Appeal from the United States
District Court for the Southern
District of New York

Sat Below:

#### CERTIFICATION

On May 7, 19 75, I, the undersigned, being of full age did deliver to Lawyers Service or mail by regular mail for service on:

Clerk of the United States Court of Appeals for the 2nd Circuit
Foley Square, New York, New York

KRONISH, LIEB, SWAINSWIT, WEINER AND HELLMAN, ESQS 1345 AVENUE OF THE AMERICAS NEW YORK, NEW YORK 10019

10 copies of RXXXX JOINT APPENDIX to the Clerk of the UNITED STATES DISTRICT COURT FOR THE SECOND CIRCUIT same to each of the following:

KRONISH, LIEB, SWAINSWIT, WEINER AND HELLMAN, ESQS.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

DATED: 5-7-75

ALLAN A. HORWITZ

